United States Court of Appeals

for the Second Circuit

APPENDIX

75-7600

United States Court of Appeals

For the Second Circuit

B

COLUMBIA BROADCASTING SYSTEM, INC.,
Plaintiff-Appellant,

against

AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS, *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York

JOINT APPENDIX

VOLUME 8 — TRIAL TRANSCRIPT — Pages 1633 to 2043

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TABLE OF CONTENTS

COURT PAPERS

VOLUME 1

	PAGE
Docket Entries	JA1
Complaint	JA19
Exhibit A	JA31
Exhibit B	JA33
Exhibit C	JA35
ASCAP Answer and Counterclaim	JA37
Excerpts from BMI's Answer and Counterclaim	JA64
Reply to ASCAP's Counterclaim	JA79
Reply Memorandum in Support of BMI's Motion for Preliminary Injunction, dated July 9, 1970	JA94
Appendix	JA115
Transcript of Proceedings of July 10, 1970	JA132
Affidavit of Amalya L. Kearse, sworn to April 26, 1971	JA170
Excerpts from Appendix to Plaintiff's Memorandum in Opposition to Defendants' Motion for Summary Judgment, dated August 16, 1971	JA177
ASCAP's Reply Memorandum in Support of its Motion for Summary Judgment, dated September 3, 1971	JA185
Transcript of Proceedings of September 14, 1971	JA197

VOLUME 2

PAGE

Excerpts from Plaintiff's Memorandum in Support of Its Rule 37 Motion to Compel Answers to Interrogatories, and Production of Documents, dated August 25, 1972 ..... JA305

ASCAP Memorandum in Opposition to CBS' Motion to Compel Answers to Interrogatories and Production of Documents, dated September 27, 1972 ..... JA314

Excerpts from CBS' Memorandum in Opposition to ASCAP's Motion for a Protective Order dated September 29, 1972 JA338

Excerpts from ASCAP's Trial Brief dated April 25, 1973 ..... JA342

Excerpts from BMI Trial Memorandum dated April 25, 1973 JA353

Excerpts from Plaintiff's Post-trial Brief dated April 8, 1974 JA358

Excerpts from ASCAP's Post-trial Brief dated June 3, 1974 JA361

BMI's Post-trial Brief dated June 3, 1974 ..... JA370

Opinion and Order of Lasker, J. dated September 22, 1975 ..... JA584

TRIAL TRANSCRIPT*

VOLUME 3

	PAGES
Donald Sipes:	
Direct	14–149
Cross	150–328

VOLUME 4

Donald Sipes (concluded)	
Cross (concluded)	329–379
Redirect	380–381
Recross	382–397
Robert B. Wright:	
Direct	397–475
Cross	476–553
Redirect	553–560
Recross	561–562

* Corrections to the trial transcript appear at the close of each day's transcript:

pages of transcript	*corrections at pages*	*pages of transcript*	*corrections at pages*	*pages of transcript*	*corrections at pages*
1 to 127	127-1 to 127-8	1799 to 1954	1954-1 to 1954-4	3576 to 3748	3748-1 to 3748-12
128 to 328	328-1 to 328-8	1955 to 2108	2108-1 to 2108-7	3749 to 3919	3919-1 to 3919-13
329 to 563	563-1 to 563-6	2109 to 2458	2458-1 to 2458-10	3920 to 4081	4081-1 to 4081-9
564 to 753	753-1 to 753-5	2459 to 2623	2623-1 to 2623-6	4082 to 4241	4241-1 to 4241-10
754 to 908	908-1 to 908-4	2624 to 2801	2801-1 to 2801-5	4242 to 4426	4426-1 to 4426-10
909 to 1089	1089-1 to 1809-4	2802 to 2995	2995-1 to 2995-16	4427 to 4613	4613-1 to 4613-11
1090 to 1273	1273-1 to 1273-4	2996 to 3176	3176-1 to 3176-8	4614 to 4731	4731-1 to 4731-5
1274 to 1445	1445-1 to 1445-6	3177 to 3378	3378-1 to 3378-14	4732 to 4873	4873-1 to 4873-14
1447 to 1632	1632-1 to 1632-5	3379 to 3524	3524-1 to 3524-5		
1633 to 1798	1798-1 to 1798-8	3525 to 3575	3575-1 to 3575-2		

PAGES

Edward Duke Vincent:
Direct 571–647
Cross 647–671

VOLUME 5

Edward Duke Vincent (concluded):
Cross (concluded) 672–726
Redirect 726–730

George A. Sunga:
Direct 731–759
Cross 759–770

Albert Berman:
Direct 771–851a
910–965
Cross 965–977
Redirect 978–987

Marion B. Mingle:
Direct 852–885
Cross 885–888
Redirect 888–889
Recross 889–890

Burton Lane:
Direct 988–999

VOLUME 6

Burton Lane (concluded):
Direct (concluded) 1000–1160
Cross 1161–1172
Redirect 1172–1176

Allen H. Arrow:
Direct 1255–1360

VOLUME 7

	PAGES
Allen H. Arrow (continued):	
Direct (concluded)	1361–1536
Eugene Goodman:	
Direct	1537–1592
Cross	1593–1600
Leon Kellman:	
Direct	1604–1631

VOLUME 8

Franklin M. Fisher:	
Direct	1636–1767
Cross	1768–1785
Walter L. Dean:	
Direct	1799–1823
Cross	1824–1861
Redirect	1862–1865
Allen H. Arrow (concluded):	
Cross	1962–1996
Redirect	1997–2003
Recross	2003–2005
Further Redirect	2006
Irwin Segelstein:	
Direct	2009–2032
Cross	2032–2042

VOLUME 9

Emil Poklitar:	
Direct	2044–2074
Cross	2074–2100
Redirect	2101–2102
Paul Marks:	
Direct	2400–2571
Cross	2571–2623

VOLUME 10

	PAGES
Paul Marks (concluded):	
Cross (concluded)	2624–2728
Salvatore Chiantia:	
Direct	2854–2910
Cross	2910–2932

Volume 11

Salvatore Chiantia (concluded):	
Cross (concluded)	2933–3058
Redirect	3058–3062
Recross	3062–3064
Alan Shulman:	
Direct	3065–3096
Cross	3097–3136
Redirect	3137–3138

VOLUME 12

Michael Dann:	
Direct	3213–3299
Cross	3299–3378
	3411–3439
John Green:	
Direct	3440–3460
Cross	3460–3476
Aaron Copland:	
Direct	3478–3487

PAGES

Arnold Broido:
Direct 3488–3497
Cross 3497–3501

VOLUME 13

Herman Finkelstein:
Direct 3577–3660
Cross 3660–3829
Redirect 3829–3837

Robert R. Nathan:
Direct 3842–3919

VOLUME 14

Robert R. Nathan (continued):
Direct (continued) 3920–3968
Cross 3969–4206

Paul Marks:
Direct 4207–4221
Cross 4221–4241

VOLUME 15

Edward Cramer:
Direct 4244–4289
Cross 4290–4358

Paul Rosenthal:
Direct 4358–4375
Cross 4376
Redirect 4376
Recross 4377–4378

Peter Q. Steiner:
Direct 4378–4419
Cross 4420–4473
Redirect 4473–4475
Recross 4475–4480

Robert R. Nathan (concluded):
Direct (concluded) 4526–4556
Cross (concluded) 4557–4613

VOLUME 16

	PAGES
Fred Silverman:	
Direct	4733–4759
Cross	4759–4766
Redirect	4766
Franklin M. Fisher:	
Direct	4767–4852
Cross	4853–4863
Redirect	4863–4864

DEPOSITIONS

VOLUME 17

	PAGE
Excerpts from the Deposition of Stanley Adams	D1
Excerpts from the Deposition of Allen H. Arrow	D66
Excerpts from the Deposition of Al Brackman	D70
Excerpts from the Deposition of Leon Brettler	D111
Excerpts from the Deposition of Salvatore Chiantia	D263

VOLUME 18

Excerpts from the Deposition of Cy Coleman	D331
Excerpts from the Deposition of Paul Fagan	D347
Excerpts from the Deposition of Herman Finkelstein	D546
Excerpts from the Deposition of Sidney Herman	D624

VOLUME 19

PAGE

Excerpts from the Deposition of Edwin H. Morris D641

Excerpts from the Deposition of William S. Paley D761

Excerpts from the Deposition of Emil D. Poklitar D766

Excerpts from the Deposition of Frank Stanton D852

Excerpts from the Deposition of Jerry Vogel D911

Excerpts from the Deposition of Ned Washington D938

Excerpts from the Deposition of Philip B. Wattenberg D991

Excerpts from the Deposition of Robert D. Wood D1013

EXHIBITS

VOLUME 20

Court Exhibit ("CX") No. 2—Stipulation between CBS and ASCAP, dated 5/25/72, in this action E1

CX 2, Exhibit No. 1—Standard form of CTN "Television Affiliation Agreement", dated 2/66 ..... E11

CX 2, Exhibit No. 2—Standard form of ASCAP writer and publisher membership agreement, Form 10M-1-72U, covering the years 1966-1975 ..... E19

CX 2, Exhibit No. 3—Standard forms of ASCAP "Application for Writer-Membership", Form 4M 11-71, with attached form of cover letter, and "Application for Publisher Membership", Form 2M 6-71, with attached form of cover letter E24

CX 2, Exhibit No. 4—Standard form of ASCAP writer and publisher membership agreement, Form 2500 7-65, covering the years 1941-1965 ..... E36

CX 2, Exhibit No. 5—Form of ASCAP "Television Performing Rights Agreement", supplementing the membership agreement (CX 2, Ex. 4) to include television performing rights E41

PAGE

CX 2, Exhibit No. 6—List of "ASCAP Affiliated [Foreign] Repertories", dated 1972 ..... E44

CX 2, Exhibit No. 7—Form of ASCAP Performing Rights Agreement used in connection with the foreign performing rights licensing societies listed in CX 2, Ex. 6 above, wherein ASCAP grants rights to licensee E46

CX 2, Exhibit No. 8—Form of ASCAP Performing Rights Agreement used in connection with the foreign performing rights licensing societies listed in CX 2, Ex. 6 above, wherein licensor grants rights to ASCAP E56

CX 2, Exhibit No. 9—"Articles of Association of the American Society of Composers, Authors and Publishers", dated 1/70 E68

CX 2, Exhibit No. 10—Amended Consent Judgment, dated 3/14/50, *U.S.* v. *ASCAP* (Civil Action No. 13-95) E124

CX 2, Exhibit No. 11—Order, dated 1/70/60, and attachments as amended to date in *U.S.* v. *ASCAP* (Civil Action No. 13-95) E139

CX 2, Exhibit No. 12—Pamphlet, whose cover is a letter, dated 6/28/63, from Stanley Adams "To All Members of the Society", describing the pamphlet's contents as "The ASCAP Survey" by Dr. Joel Dean, which Judge McGeehan suggested be distributed to all ASCAP members E209

CX 2, Exhibit No. 13—ASCAP Financial Statements for the calendar years 1960-1969, with attached cover letters from Stanley Adams to "Dear Member", dated 4/11/61, 4/19/62, 4/1/63, 4/18/64, 4/15/65, 4/20/66, 4/24/67, 4/4/68, 4/2/69, 4/9/70, respectively E254

CX 2, Exhibit No. 14—Standard forms of ASCAP license agreements, currently in effect:

Title	*Form No.*
Local Station Blanket Radio License	5M-11-69-U
Local Station Per Program Radio License	7500-9-67
Local Station Blanket Television License Agreement	—
Local Station Per Program Television License Agreement	— E285

CX 2, Exhibit No. 15—Standard forms of ASCAP license agreements, preceding the current forms (CX 2, Ex. 14):

		PAGE
Title	*Form No.*	
Local Station Blanket Radio License	3M-3-67	
Local Station Program Sustaining License	160	
Local Station Blanket Television License	1M-12-67	
Local Station Per Program Television License	1000 Jan. 1967(u)	E354

VOLUME 21

CX 2, Exhibit No. 16—Certificate of Incorporation of Broadcast Music, Inc., dated 10/13/39 ..... E371

Court Exhibit No. 3—Stipulation between CBS and BMI in *CBS* v. *ASCAP*, dated 10/15/71 ("So Ordered 10/26/71") E386

Plaintiff's Exhibit No. 12—Finkelstein Affidavit, dated 6/25/70 in *U.S.* v. *ASCAP (NBC Application)* E390

Plaintiff's Exhibit No. 14—Finkelstein Affidavit, dated 7/10/70 in *U.S.* v. *ASCAP (NBC Application)* E405

Plaintiff's Exhibit No. 24—Excerpts from ASCAP Brief on Appeal, dated 3/30/71, *United States* v. *ASCAP* (*Matter of Zekley*) E415

Plaintiff's Exhibit No. 53—AGAC Uniform Popular Songwriters Contract, bearing copyright dates: 1948 (SPA) and 1969 (AGAC) E430

Plaintiff's Exhibit No. 84—Letter dated 10/29/59 from Salvatore Chiantia to Miriam Stern E439

Plaintiff's Exhibit No. 102—Post-1970 pamphlet, "ASCAP—The Facts" E441

Plaintiff's Exhibit No. 106—Stanley Adams' "Remarks—AGAC Meeting, Hotel Edison, October 28" E448

Plaintiff's Exhibit No. 123—Letter dated 11/4/65 from Harold Spina to Miriam Stern E458

Plaintiff's Exhibit No. 124—Letter dated 11/19/65 from Michael H. Goldstein to Burton Lane E461

Plaintiff's Exhibit No. 125—Memorandum dated 1/24/66 from Abel Baer to Donald Kahn enclosing AGAC Counsel "Report to the West Coast Committee" dated 1/12/66 ..... E465

Plaintiff's Exhibit No. 127—Memorandum dated 4/22/66 from Leon Kellman to Burton Lane E470

PAGE

Plaintiff's Exhibit No. 133—Excerpt from "Report to New York AGAC Counsel from the West Coast Committee" dated 5/11/67 ..... E475

Plaintiff's Exhibit No. 134—Letter dated 5/18/67 from Burton Lane to Vic Mizzy E477

Plaintiff's Exhibit No. 135—Memorandum dated 7/25/67 from Burton Lane to AGAC West Coast Committee E480

Plaintiff's Exhibit No. 137—Excerpt of Report of the AGAC West Coast Committee Meeting dated 5/10/66 ..... E484

Plaintiff's Exhibit No. 162—Memorandum dated 10/19/59 from Miriam Stern to Alan Shulman enclosing Lane-Bernstein letters 10/2/59, 10/6/59, 10/14/59 and 10/15/69 ..... E486

Plaintiff's Exhibit No. 405—Blanket Network Television License Agreement between NBC and ASCAP, dated 1/10/58 as of 1/1/58, covering the period 1/1/58 through 12/31/61 (furnished by ASCAP as Exhibit M in connection with ASCAP Answer, dated 6/30/70 to CBS Interrogatory 28) E491

Plaintiff's Exhibit No. 430—ASCAP Supplementary Answer, dated 3/15/73, to CBS Interrogatory No. 26 ..... E533

Plaintiff's Exhibit No. 442—Form of BMI publisher affiliation agreement used from January 1959 to March 1969 (furnished by BMI as Exhibit 1 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory No. 9) E537

Plaintiff's Exhibit No. 443—Two forms of BMI publisher affiliation agreement used from March 1969 to August 1970 (furnished by BMI as Exhibit 2 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory No. 9) E543

Plaintiff's Exhibit No. 449—Two forms of BMI writer affiliation agreement used from December 1968 to July 1970 (furnished by BMI as Exhibit 8 in connection with BMI Answer, dated 3/26/71, to CBS Interrogatory 9) E552

PAGE

Plaintiff's Exhibit No. 458—BMI Answer, dated 3/23/73, to CBS Interrogatory No. 26 ..... E561

Plaintiff's Exhibit No. 469—BMI Writer Payment Schedule in effect as of January 1, 1972 (Dated September 1972) E563

Plaintiff's Exhibit No. 470—BMI Publisher Payment Schedule in effect as of January 1, 1972 (Dated September 1972) E570

Plaintiff's Exhibit No. 471A—BMI-Publisher Affiliation Agreement with a publisher where no previous agreement between the parties existed E577

Plaintiff's Exhibit No. 471B—BMI-Publisher Affiliation Agreement with a publisher canceling and superseding any prior agreement between the parties E582

Plaintiff's Exhibit No. 472—Current form of BMI-Writer Affiliation Agreement E587

Plaintiff's Exhibit No. 513—Affidavit of Edward M. Cramer, in this action, dated 10/21/70 ..... E592

Plaintiff's Exhibit No. 517—Memorandum of defendants ASCAP, et al. (by Paul Weiss), dated 11/10/71, in this action E598

Plaintiff's Exhibit No. 567—Excerpts from Statement of Herman Finkelstein, General Attorney for ASCAP on Hearing Before Special Subcommittee of the Judiciary Committee of the House of Representatives in Connection with Its Study of the Anti-Trust Laws, September 18, 1956 ..... E606

Plaintiff's Exhibit No. 568—Excerpts from Deposition of H. Finkelstein in *Cascade Broadcasting Co.* v. *ASCAP* E611

Plaintiff's Exhibit No. 572—Excerpts from deposition of Edward Cramer in *BMI* v. *NBC* E627

Plaintiff's Exhibit No. 575—ASCAP's Reply Memorandum (by Sullivan & Cromwell) dated 5/1/70, *United States* v. *ASCAP (Application of NBC)* E633

PAGE

Plaintiff's Exhibit No. 579—BMI pamphlet, "You—and the Music You Use", dated 7/69 ..... E646

Plaintiff's Exhibit No. 689—Letter dated 10/29/64 from Allen Arrow to George Lee E652

Plaintiff's Exhibit No. 722—AGAC Bulletin dated May 1966, Volume 3, No. 2 ..... E655

Plaintiff's Exhibit No. 839—Music Study, Summaries of Transactions, Songs and Plays of All Performances for 17 ASCAP Publisher Groups E660

Plaintiff's Exhibit No. 840—Music Study, Summaries of Transactions, Songs and Plays of Feature and Qualifying Performances for 17 ASCAP Publisher Groups E671

Plaintiff's Exhibit No. 866—Draft, dated 11/1/65 of 3MPX 27 ..... E682

Plaintiff's Exhibit No. 899—Respondent's Conditional Offer of Proof, 4/17/62, *U.S.* v. *ASCAP (Shenandoah)* E692

VOLUME 22

Plaintiff's Exhibit No. 900—Transcript of 34th Annual Meeting of AGAC, November 1965 ..... E731

Plaintiff's Exhibit No. 908—Affidavit of Michael Dann, sworn to July 7, 1970, in this action E808

Plaintiff's Exhibit No. 962—H. Finkelstein Affidavit 12/21/61, in *U.S.* v. *ASCAP (Shenandoah)* E815

Plaintiff's Exhibit No. 986—Letter dated November 12, 1971, from Alan J. Hruska to Jay H. Topkis E825

Plaintiff's Exhibit No. 987—Letter dated November 18, 1971, from Jay H. Topkis to Alan J. Hruska E829

Plaintiff's Exhibit No. 992—Letter from Allan Blumstein to Alan J. Hruska dated February 12, 1974 ..... E831

3MPX No. 2—Memorandum dated 7/6/64, "ASCAP Performance Fee Proposal; 3M-700 Outright Sale Unit" E833

PAGE

3MPX No. 4—Letter dated 8/18/64 from J.M. Collins to Allen Arrow E838

3MPX No. 7—Letter dated 8/27/64 from J. M. Collins to Allen Arrow E840

3MPX No. 11—Memorandum "Tentative Proposal to ASCAP from 3M for Use in Connection with the 3M-700 Series" E842

3MPX No. 18—Letter dated 6/28/68 from Allen Arrow to M.E. Ricketts E845

3MPX No. 19—Letter dated 7/4/68 from Mr. M.E. Ricketts to Allen Arrow E847

3MPX No. 27—Letter dated 11/15/65 from Burton Lane to "Dear Publisher" E849

3MPX No. 42—Memorandum dated 12/28/74 from Allen Arrow to Milton Kramer E853

3MPX No. 43—Memorandum dated 1/12/65 from Milton Kramer to Allen Arrow E858

3MPX No. 47—Letter dated 7/15/65 from Alan L. Shulman to Allen Arrow E860

3MPX No. 49—Letter dated 10/11/65 from Allen Arrow to R.E. Lindgren E862

3MPX No. 72—Letter dated 11/17/65 from Lee V. Eastman to Allen Arrow E864

3MPX No. 75—Letter dated 4/22/66 from Allen Arrow to R.E. Lindgren E866

3MPX No. 144—Letter dated 11/5/64 from R.E. Lindgren to Arthur Israel E871

3MPX No. 145—Letter from E. C. Timberlake to A. Arrow, dated 12/1/64 ..... E874

3MPX No. 168—Memorandum dated 11/19/65 from Alan Shulman to Harold Richmond E879

PAGE

3MPX No. 171—Letter dated 12/4/64 from Allen Arrow to Phillip B. Wattenberg enclosing copy of a letter dated 11/27/64 from R. E. Lindgren to M. E. Ricketts E881

ASCAP Exhibit No. 126—CBS-BMI Television Network Blanket License dated 1950 with letters extending to 1969 ..... E888

ASCAP Exhibit No. 127—CBS-ASCAP TV Network Blanket License Agreements dated 10/17/49, 2/19/54 ..... E907

VOLUME 23

ASCAP Exhibit No. 127 (concluded)—CBS-ASCAP TV Network Blanket License Agreements dated 1/10/58 and 12/19/69 1042

ASCAP Exhibit No. 175—ASCAP-ABC Blanket License for ABC Television Network dated 1/10/58 ..... E1138

ASCAP Exhibit No. 184—Letter dated 10/2/59 from Burton Lane to "Gentlemen" E1229

ASCAP Exhibit No. 193—Contract dated November 5, 1965, between 3M and Fred Ahlert Music Corp. E1231

ASCAP Exhibit No. 194—Contract dated November 5, 1965, between 3M and Ahlert-Burke Corp. E1244

ASCAP Exhibit No. 195—Contract dated August 23, 1965, between 3M and Barton Music Corp. E1257

ASCAP Exhibit No. 196—Contract dated January 22, 1965, between 3M and Bourne Co. E1268

ASCAP Exhibit No. 197—Contract dated October 1, 1965, between 3M and Brandom Music Corp. E1278

ASCAP Exhibit No. 198—Contract dated February 2, 1966, between 3M and Chippendale Music Co. E1289

VOLUME 24

PAGE

ASCAP Exhibit No. 199—Contract (unexecuted) dated June 1, 1965, between 3M and Compton Music Corp. E1300

ASCAP Exhibit No. 201—Contract dated June 5, 1965, between 3M and Consolidated/Dorsey Bros. E1309

ASCAP Exhibit No. 202—Contract dated July 26, 1965, between 3M and Criterion Music Corp. E1319

ASCAP Exhibit No. 203—Contract dated August 19, 1965, between 3M and Four Jays Music Inc. E1328

ASCAP Exhibit No. 204—Contract dated April 14, 1966, between 3M and Frank Music Corp. E1339

ASCAP Exhibit No. 205—Contract dated October 1, 1965, between 3M and Holloway Publishers, Inc. E1352

ASCAP Exhibit No. 206—Contract dated January 25, 1965, between 3M and Jewel Music Publishing Co. E1361

ASCAP Exhibit No. 207—Contract dated July 26, 1965, between 3M and Joy Music, Inc. E1371

ASCAP Exhibit No. 208—Contract dated October 1, 1965, between 3M and International Korwin Corp. E1379

ASCAP Exhibit No. 209—Contract dated March 1, 1965, between 3M and Leeds Music Corp. E1390

ASCAP Exhibit No. 210—Contract dated March 15, 1966, between 3M and Mills Music Inc. E1400

ASCAP Exhibit No. 211—Contract dated March 15, 1966, between 3M and Pic Corporation E1412

ASCAP Exhibit No. 212—Contract dated August 3, 1966, between 3M and Ray Music Co. E1423

ASCAP Exhibit No. 213—Contract dated September 1, 1965, between 3M and Ross-Jungnickel Music Inc. E1432

ASCAP Exhibit No. 214—Contract dated September 7, 1966, between 3M and St. Nicholas Music Inc. E1446

ASCAP Exhibit No. 215—Contract dated February 21, 1966, between 3M and Sam Fox Publishing Co. E1458

PAGE

ASCAP Exhibit No. 216—Contract dated September 1, 1965, between 3M and Southern Music Publishing Co. E1471

ASCAP Exhibit No. 217—Contract dated January 25, 1965, between 3M and Shapiro, Bernstein & Co., Inc. E1486

ASCAP Exhibit No. 219—Contract dated October 1, 1965, between 3M and Laurel Music Corp. E1496

ASCAP Exhibit No. 222—Contract dated April 2, 1965, between 3M and Hi-Ti Music Corp. E1507

ASCAP Exhibit No. 223—Contract dated November 5, 1965, between 3M and Milene Music, Inc. E1517

ASCAP Exhibit No. 290—Agreement dated as of 7/1/67 between CLGA and Producers E1529

ASCAP Exhibit No. 326—Gitter Affidavit dated 6/17/74 in this action E1563

BMI Exhibit No. 114—BMI Consent Decree dated December 29, 1966 ..... E1568

BMI Exhibit No. 166—Letter from Edward Cramer to CBS dated October 29, 1969 ..... E1579

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ITED STATES DISTRICT COURT
OUTHERN DISTRICT OF NEW YORK

OLUMBIA BROADCASTING SYSTEM	Before: HON. MORRIS E. LASKER, District Judge
vs.	
ERICAN SOCIETY OF COMPOSERS, THORS & PUBLISHERS, ET AL.,	69 CIVIL 5740
DEFENDANTS.	

New York, May 16, 1973

STENOGRAPHER'S MINUTES

Columbia Broadcasting System

v. 69 Civil 5740

American Society of Composers,
Authors and Publishers, et al.

May 16, 1973
10:00 a.m.

(Trial resumed.)

MR. COLLINS: If it please your Honor, I would like to offer into evidence at this time portions of the following depositions and I would propose to read off the names of depositions and their exhibit numbers.

THE COURT: Have Mr. Topkis and Miss Kearse been informed of these?

MR. COLLINS: Yes, they have been notified and also given a list of the page and line designations from those depositions.

I would propose to read into the record the names and exhibit numbers and then give the Court Reporter a list of the page and line designations of each of the depositions.

MR. TOPKIS: Yes, your Honor, we have not as yet been able to complete our consideration of these, and I wonder, since we are talking only about a mechanical act, whether it would not be possible to defer it until we are able to give our current designations, which we could do --

THE COURT: It is perfectly all right with me.

Is there any reason why-- I don't want you to wait indefinitely but--

MR. TOPKIS: No, no, we could do it first thing next week, get it done over the week-end. Then it would all be in the record at the same point.

THE COURT: Is there any problem for you as far as that is concerned?

MR. HRUSKA: I don't think there is a problem, your Honor. I think that Professor Fisher to some extent may be relying on the depositions but I do not think that they actually have to be in evidence for our expert to rely on them.

THE COURT: To the extent that he relies on them we can put them into evidence at the time necessary. I am sure Mr. Topkis is not going to make a technicality of that.

MR. TOPKIS: Of course not.

MR. HRUSKA: Fine. Then we are prepared, your Honor, to call Dr. Fisher to the stand.

THE COURT: Very well.

F R A N K L I N M. F I S H E R, called as a witness by the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HRUSKA:

Q What is your present position, sir?

A I am Professor of Economics at the Massachusetts Institute of Technology.

Q From what university did you graduate?

A I graduated from Harvard.

Q What degrees did you receive?

A I received the AB summa cum laude in 1956, the MA in 1957, and Ph.D. in 1960 all in Economics.

Q Did you write a thesis as an undergraduate?

A Yes, I did.

Q What was the subject of that undergraduate thesis?

A It was a study of the wayin which society looks at the distribution of personal income.

MR. TOPKIS: I'm sorry, I didn't hear those last words.

A The distribution of personal income.

Q Was that thesis subsequently published?

A It was published as an article in the Quarterly

Journal of Economics in the year I graduated.

Q I take it, Professor Fisher, that you wrote a thesis for your Ph.D.?

A Yes, I did.

Q What was the subject of that thesis?

A That was a set of connected essays in the branch of economics that is known as econometrics.

Q Could you tell us what econometrics is?

A Econometrics is the science of using quantitative empirical data to test hypotheses from economic theory and mke predictions about economic behavior.

Q What were the general subjects of the connected essays that you referred to as being part of your Ph.D. thesis?

A Well, some of them were methodological and some of them were empirical studies.

There was a study of the demand for aluminum ingot in the United States, the demand for railroad passenger transportation in the Northeast Corridor, and of the functioning of the British Wheat Market in the 19th Century.

THE COURT: The British what?

A Wheat market.

Q Was your Ph.D. thesis published?

A Yes, it was published as a book.

Q Could you tell us the title of it or the publisher of it?

A I can. Its title was "A Priori Information and Time Series Analysis, Studies in Economic Theory and Measurement" and it was published by North Holland Publishing Company in 1962.

Q While you were at Harvard were you awarded any prizes or did you receive any other distinctions?

A Yes, aside from the-- receiving the degree with highest honors, I was awarded, while I was in Harvard College, a Detur Prize, a John Harvard Fellowship, a Harvard College Fellowship.

THE COURT: It isn't really necessary from my point of view to make Dr. Fisher go through this. I graduated from Harvard College somewhat earlier than Dr. Fisher and somewhat lower on the scale and I know what it means to graduate summa cum laude.

I am interested in his professional accomplishments but prizes from Harvard --

Q Let me just ask this then: Were you elected as a Junior Fellow of the Society of Fellows?

A Yes, I was.

Q Could you tell us what the Society of Fellows is?

A The Society of Fellows each year elects eight people -generally of the age of graduate students from all five fields from nominees from institutions around the country and occasionally from abroad. These Junior Fellows have three years in reasonably comfortable circumstances. They don't have to do anything but do research.

Q Who were some other economists who have been elected Junior Fellows of the Society of Fellows?

A Well, there have been quite a few. They would include Carl Kaysen, now the Director of the Institute for Advanced Study; John Meyer, who is the President of the DNational Bureau of Economic Research and, of course, the-- I guess the best known economist who was a Junior Fellow was the first one, that is Paul Samuelson whose colleague now I am at MIT.

Q While you were at Harvard did you teach there?

A I did.

I taught in an undergraduate course in industrial organization. I lectured in a graduate course in-- also in industrial organiztion. In that course I gave lectures on the petroleum industry, and I taught a course in mathematics for economists.

Q Could you explain the subject of industrial organization?

A Industrial organization is the study of how markets operate and how competition monopoly and oligopoly works.

Q Have you done any other teaching in that subject?

A Well, I participated for many years in a seminar held jointly between t he Harvard Law School and the Harvard Department of Economics in industrial organization and antitrust policy.

I was first a student,then I was a senior visitor,and then I was one of the faculty in the course when it was given jointly with the MIT Department.

Q Is that what is known as an inter-disciplinary course on economics?

A Well, I am sure I thought so and I presume the lawyers did.

Q Could you tell us who the other professors in that course were?

A Well, the faculty varied from time to time. The complement of professors who were there the most were among -- for the economists Carl Kaysen and Edward Mason, and for the lawyers Kingman Bre wster and Donald Turner.

Q When did you leave Harvard?

A In the summer of 1959.

Q What did you do after leaving Harvard?

A I went to the University of Chicago where I became an assistant professor of economics.

Q Did you teach anything else at Harvard other than economics? Let me ask you first, what particular field of economics did you teach at Chicago?

A Oh, at Chicago I taught graduate courses in price theory and mathematics for economists.

Q What is price theory?

A Well, in a way price theory is the theoretical side of what I described earlier as industrial organization, although it is rather broader than that. It is the theoretical study of how competition operates, how markets operate, how firms, households, and other decision-makers react to prices.

Q How long were you at the University of Chicago?

A For a year.

Q What did you do after that?

A After that I went to MIT where I became assistant professor of economics.

Q In what year was that?

A That was 1960.

Q Have you held any other positions on the faculty of MIT?

A I became associate professor of economics in 196 and full professor of economics in 1965.

Q What courses have you taught while at MIT?

A Other than the seminar in joint with the Harvard Law School, which I mentioned, I have taught principally courses in price theory, econometrics and mathematics for economists.

Q Have you ever taught at any other institutions?

A Well, I have had leaves from MIT a couple of times and I have taught at the London School of Economics, at Oxford University, and I am currently teaching at the Hebrew University of Jerusalem and the University of TelAviv.

Q What did you teach at the London School?

A Price theory.

Q And at Oxford University.

A I taught econometrics.

Q And now at the Hebrew University?

A Both those things.

Q Have you ever lectured at any other institution?

A I have lectured or given seminars at roughtly 20 institutions, universities, in this country and about two dozen abroad.

Q Have you had any books or articles published other than the ones you have already mentioned?

A Yes, I have published a total of I think it is six books and upwards of 70 or 80 articles.

MR. HRUSKA: I would like, your Honor, to mark as an exhibit what we have previously included in Exhibit A for a statement concerning expert witnesses which was put in at an earlier part of the case; and we have a number PX880, and I would like to show that to Professor Fisher.

Q Could you look over that and tell me whether that is a complete list of your publications.

A Can I tell you first that my name is spelled wrong?

Q Yes. Is it?

A Yes.

Q All right.

THE COURT: Y ou really want him to look over it and see if it is complete in a literal sense?

THE WITNESS: It is somewhat out of date, your Honor.

MR. HRUSKA: I just learned, your Honor, that there were things that Professor Fisher has published since that list was compiled, and rather than take the Court's time with it now, I thought we would just put in a supplementary list tomorrow.

THE COURT: Fine.

MR. HRUSKA: Meantime I would offer this in

evidence.

THE COURT: By the time I decide this case he will have written seven more books.

MR. HRUSKA: No doubt.

MISS KEARSE: Your Honor, I would like to ask Mr. Hruska if he could give us the list of additional publications as soon as possible, because we don't know how long Professor Fisher is going to be on the witness stand and we would like to know everything that he has written, as well as the ones we have been given so far.

THE COURT: All right. I am sure there is no problem.

MR. HRUSKA: As soon as we receive it we will send it over.

Q Let me ask you this: Have these publications, Mr. Fisher, fallen into some general categories?

A Yes.

Q Could you describe those categories?

A Yes. On the whole, they fall into three categories. There are methodological studies of econometrics, there are artic les in price theory,and there are empirical studies of various aspects of different markets. That would include some studies of parts of, let's see, I think I mentioned the aluminum industry, railroads, the

electricity, community antenna television and local television broadcasting, the copper industry, the automobile industry, petroleum industry; I believe that's all.

Q Have you done any consulting work?

A Yes, I have done both Government and private consulting work. In terms of Government consulting work I have been a consultant to the Federal Power Commission where I consulted on the building of a quantitative model to help assess the effect of regulation on supply and demand for natural gas; I have been a member of a committee set up by the board of governors of the Federal Reserve System to do research into aspects of price indices.

I have been a consultant to the Institute of Naval Studies which is a private non-profit outfit which does research for the Navy. In connection with my work in the copper industry I was a consultant of some sort to the United Nations.

In private consulting, I have been a consultant to the United Transportation Union, the National Association of Broadcasters, IBM; there may be some more, but I can't think of them at the moment.

Q What other professional activities have you been involved in in the field of economics?

A I am a member of the Brookings Institution Steering Committee on their program in studies in the regulation of economic activity.

I am a senior research associate of the National Bureau for Economic Research.

I have been the associate editor of the Journal of the AmericanStatistical Association, and the chief American editor of the Review of Economic Studies.

Since 1968, I have been the editor of Econometrica which is the professional journal put out by the Econometric Society.

Q You mentioned the Journal of the American Statistical Association?

A Yes.

Q Have you received any awards for your professional activities?

A Well, it seems I am modest, but it is a pleasure to say yes.

Q Could you tell us what those are?

A I have been elected a Fellow of the Econometric Society. I am currently serving a term as a council member of the Econometric Society.

I was elected a Fellow of the American Academy of Arts and Sciences.

In 1968, I was named the Irving Fisher lecturer of the Econometric Society for its European meetings.

THE COURT: Are we supposed to put "no relative" in parenthesis?

THE WITNESS: Yes, your Honor, you are supposed to put "not relative" in parenthesis.

Q How is that spelled?

A R-e-l-a-t-i-v-e -- same as me, F-i-s-h-e-r.

And let's see, I received a prize from the Operations Research Society of America for the best article published in their journal in 1967 on a military subject.

Q Have you received any fellowships in research?

A I was a National Science Foundation post-doctoral fellow and I held a Ford Foundation faculty research fellowship. My research has largely been supported by grants mostly from either the Ford Foundation or the National Science Foundation.

Q Could you outline some of the more important goals that our economic system is expected to achieve?

MR. TOPKIS: Is that a proper question, your Honor?

THE COURT: Well, I suppose that we are closing

in from the outside to the center. I don't know what it is going to add up to, but it is not going to prejudice me to hear that.

MR. TOPKIS: No.

THE COURT: I assume that the generalities will be relatively few and we will get to specifics in this case shortly.

MR. HRUSKA: That's right, your Honor. They will. Yes.

A Well, among the goals which our economic system is expected to achieve is that of allocation of resources. That is the production and distribution -- efficient allocation of resources, I should have said. That is the production and distribution of goods and services without waste but, more than that, it is the production of the types of goods and services that consumers want.

That is closely allied to the goal of consumer sovereignty -- the notion that consumers, as it were, voting with their dollars, ought to be able to influence what they get to the extent that it is feasible.

Then there are goals associated with growth, the provision of more goods and services, higher standards of living overtime.

Associated with that is the goal of progressiveness, the production of new goods and services, finding of new ways to serve customer needs.

Then there are goals associated with fairness -- the view that individuals or firms who successfully serve the customer ought to be rewarded; less efficient service to the customer ought not to be so rewarded.

Finally, there are goals of openness of opportunity -- the notion that customers ought to be able to choose, if they are willing to pay the different prices, from a range of alternatives and that range ought to be as broad and low-priced as possible, and that employment opportunities ought to be opened.

Q What are the basic means of achieving those goals in our economic system?

A Well, at least some of those goals and to some extent all of the goals are achieved in the United States by reliance on a system of price competition.

Q How does price competition work to achieve those goals?

A Well, under price competition, firms who offer certain types of goods or services at a higher price than necessary find that other firms come in, offer them at a lower price, offer similar goods at a lower price, bid

the business away from the original firms.

Similarly, firms who offer at a given price not the best quality goods, in the sense of best suited for serving customer needs, find other firms come in, offer goods better suited to serve customer needs at the same price, bid away their business.

If customers want something more, a certain type of goods or services, they will be willing to pay for it, the price will rise, that will create profit opportunities in the production of that kind of goods or service.

Firms seeking those profits will be drawn into the production of the goods or service which customers want.

Similarly, when there is price competition, the kinds of goods and services which customers want less will have their prices bid down. That is where the price competition comes in. That will create lower profit opportunities or losses in the production of goods customers want less.

Firms will be driven out of that kind of production.

The net result is a transfer of resources from the production of the kind of things that customers want less to the kind of things that customers want more.

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Q What happens in a market when price competition does not occur?

A In a market in which price competition does not occur, a firm or a group of firms have been able to insulate themselves from the discipline of the market place. In this case, if they are not producing the things which customers want at a given price or offering the lowest price for the things they are producing, they can avoid doing so because it won't happen that other firms come along and offer better things at the same price or thesame things at a lower price, and bid their business away. That is what price competition does -- prevent the offering of lower prices for the same thing.

Q Have you read and studied any materials in connection with your preparation for testifying today?

A Yes, I have. I have read the stipulations. I have read most of the depositions in this action and I have read the entire transcript.

THE COURT: Of the trial to date?

THE WITNESS: Of t he trial to date, with the exception of yesterday afternoon.

Q As a result of that reading, have you gained some understanding of the way in which ASCAP and BMI license music performance rights to television networks?

A Yes, I have.

Q In your opinion, is that system of licensing music performance rights a competitive one?

A No, it is not.

Q Can you tell us why?

A Well, under the present arrangements, the performing rights societies issue a blanket license in which the amount of money which the networks pay for performing rights is not affected by the amount of use which the networks make of the music.

Given this situation, networks have no incentive to go out and directly license, directly deal with individual copyright owners and it would be very foolish for them to do so, because they already own the rights they need; they have already paid for that in terms of the blanket license.

To go out and deal with individual copyright owners would mean paying twice for the same thig.

In this situation, direct licensing in effect cannot take place and it does not take place and the result of that is that there is no price competition because there are essentially no quoted prices except the prices for the blanket licenses.

Indeed, even if an individual copyright owner wanted to compete on the basis of price, he could not

possibly do so because no matter what he charges, if the network goes and deals with him for his music while retaining the blanket license, the network is paying twice for the same thing.

No sensible network is going to do that.

Q In economic terms, how would you characterize this system?

A I describe it as a system in which competition has been prevented essentially by the actions of a cartel.

Q Professor Fisher, what does the term "market functioning" mean to an economist?

A A market function is when buyers and sellers have an opportunity to find each other, come together and consider each other's offerings.

Q Now, you have testified that the present system in your opinion is not a competitive one.

Are the restraints on competition in your opinion the minimum extent necessary for the market to function in the licensing of performance rights to television networks?

A No.

Q What is the basis of that opinion?

A Well, consider what it takes for the market for performance rights to function. The first thing that has

SOUTHERN DISTRICT COURT REPORTERS
UNITED STATES COURT HOUSE

to happen is that the people who want to use the music and the people who own the rights to the music have got to get together and agree about the terms of the license.

Once that is done under some forms of agreement, the use of the music may be monitored, if that seems desirable to the seller and the results of that monitoring reported, bills have to go out, money has to be paid and things like that.

Now, the thing about that is that none of those functions invove the issuance of a blanket license. They are all independent of the form in which the license is issued. As a matter of fact, none of those functions require that there be a central licensing agency. It does not have to be the case that the monitoring function, for example, is done by a central agency who also issues the terms of the licenses.

That may be convenient but it is certainly not necessary.

Billing can be done by individuals but in any case, whether it is done by centralized agency or not, none of this functioning involves the form of a blanket license.

I think it is easiest to see that the market would function in the absence of a blanket license by considering one of the reliefs which CBS has proposed in

SOUTHERN DISTRICT COURT REPORTERS
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this case; namely, to suppose that ASCAP and BMI were enjoined as of some future date from licensing television networks altogether for performance rights.

That would be a system with essentially blanket licenses forbidden.

What would happen? Well, program packagers would not lose their need for music; copyright owners would certainly find it in their interest to issue licenses for performance rights with buyers who want to buy and sellers who want to sell.

One would expect that, given some lead time, the machinery would develop which would enable this to take place. That machinery can be of more than one form.

One possibility is that copyright owners would send in the names and addresses either themselves or the people authorized to make a deal for them, to be put into network computer systems.

Another possibility is that houses such as the Harry Fox Agency would perform the service of putting together buyers and sellers -

THE COURT: May I ask in the possibility such as you are discussing, we all know, of course, they have been discussed in the transcript already, whether the idea has been your idea which in the course of your

consultations with CBS you have suggested to them or whether you are commenting on an idea that you know that they have raised.

THE WITNESS: You mean did I suggest the form of relief?

THE COURT: Not the form of relief but you mentioned various ways in which the market might function if the relief in the injunction were granted and I wondered whether those ways had been concived by you or by others than you?

THE WITNESS: Well, certainly at least in part by me. I have of course discussed them with the people at CBS.

THE COURT: You were talking about the possibility of using the Harry Fox Agency.

I'm sorry to interrupt your train of thought.

A Yes, or indeed similar agencies, and individual copyright owners might for example find it convenient to have agents who would act for many of them at once.

But I think it is essentially inconceivable that there is any large obstacle to having those arrangements go on in a situation in which ASCAP and BMI are out of the picture as regards blanket licenses and I think that is, the best view, the best reason for supposing that

the present restraints on competition are not necessary.

Q What do you think would happen to the monitoring function in a market in which ASCAP and BMI were out of the picture as you say?

MR. TOPKIS: I'm sorry. I didn't hear some of those words.

Could I have the question?

(Question read.)

A Well, if sellers, that is, copyright owners, wanted to have the monitoring function performed as they well might, then it seems to me that monitoring services would find it profitable to do so.

There isn't any great barrier to entry to the provision of those services. I couldn't, of course, speculate on whether ASCAP or BMI would then choose to undertake the service but if they did not and enough copyright owners wanted to do it, someone would find it profitable to enter the market and perform that service.

Q Professor Fisher, I would like to hand you a memorandum which has been submitted in this case, called The Elements of A per Use License.

Have you seen that before?

A Yes.

THE COURT: Is this the one that was delivered

a few days ago by CBS?

MR. HRUSKA: Yes, your Honor. Right.

Q Do you have an understanding of those elements?

A Yes, I do.

THE COURT: I think it would be a good idea for us to mark that for identification.

MR. HRUSKA: Fine.

xx (Plaintiff's Exhibit 881 marked for identification.)

Q Are you familiar, sir, with what we mean in this case by the per use system?

A Yes, I am.

Q In your opinion, how would the market for the licensing of music performance rights to television networks function in the per use system?

A Well, I think the basic distinction between the way in which the market would function if the performing rights societies were enjoined from issuing blanket licenses to television networks, and the way in which it would function in the per use system has in part to do with the transition to a competitive market and in part to do with the creation of machinery which assists the functioning of that market.

The thing about the per use license system is the per use system creates its own machinery. Let me expand on it.

When the system goes into opeation, the parties, as I udnerstand it, will have to negotiate a fee schedule or else a fee schedule will be set by the Court. There has been some discussion in the transcript of whether that fee schedule, for instance, would involve different fees for different songs, or the same fee for different songs in the same use, different fees for different uses.

In my view it does not matter; and the reason that it does not matter is that within broad limits, the fees set in the per use system don't matter very much. The system is self-correcting.

If fees are set too high, packagers will have an incentive to find copyright owners and bargain with them for the use of their music below the per use rate, and the copyright owners will have the opportunity to get their-- give further incentives to packagers to get their music used by offering lower prices.

On the other hand, if the fee is set too low, copyright owners who have the rights to songs with particularly valuable characteristics, special characteristics, they have reason to believe they can get more than the per use rate for it, will have every incentive to withdraw from the system, and in withdrawing, because thereby for the purpose of negotiating a higher rate, they will leave their name and phone number or the name and phone number of their agent in the system.

So that what will happen, if the fee is set too low is that there will be withdrawals and negotiations outside the system rather than under it.

The fee would have to be set high enough, as I understand it, to give a fair return to the owners of music

already in the can, and the owner -- and to give a fair return for the no-notice use of music but apart from that, it does not seem to me really to matter very much.

As soon as the system goes into being and as soon as the opportunity for withdrawal is given, or at least as soon as people understand what is happening, a competitive price market has come into being; in accordance with this.

Apart from that I don't think there is any difference as to what will be the eventual functioning of the market between the two cases.

What I have just said also points up what I think would happen to prices under either system. Songs which are relatively interchangeable with other songs will go for low prices. Their owners will have an incentive to get them played and the only way they will be allowed to do that, if they are allowed to, is to offer them for a lower price, and that is the way competition is supposed to operate.

Songs which have relatively unequal characteristics will not go for low prices, they will go for relatively high prices.

When a packager calls up an agent or a copyright owner and says, "I want to use some particular song" the

copyright owner has some indication that the packagers, as they have testified, often have something in mind to be built around the song, something that is already underway, set designs, a guest star, and a particular limited amount of time, and that the packager's opportunities are relatively limited.

In that situation the owner of a copyright for the particular song has a good deal of bargaining power and if he is reasonably wise he will exercise it.

Something like this goes on now in the movie peroformance rights market as Miss Mingle testified where it matters to the publishers of the song what use is going to be made of it; will there be a sync vocalist, - there is more of that in the depositions.

I believe Mr. Brettler testified at his deposition that he would want to know, you know, was the song particularly appropriate for use. Was it a song that -- if it was a movie about the invasion of Normandy, was it a song that was used at that particular time, and if it was, then he would feel he was able to command a higher price, and I think he is quite right about that.

THE COURT: Would you agree with me that the factors that have been mentioned - I haven't heard the witnesses who have deposed, except to the extent they have

testified here-- the factors that have been mentioned as relating to the valuation of performance rights, the Fox Agency situation which is the only one that exists, are identical with what they would be in other man-to-man bargaining situations, that is, the nature of the need of the buyer, the public acceptance of the article that is being put on display?

I found nothing exceptional in the dynamics of that process. Did you?

THE WITNESS: No, I think that would be quite the way it would function.

BY MR. HRUSKA:

Q I think you probably made this clear but am I correct in assuming, Professor Fisher, that you believe that the market for the licensing of performance rights to television networks would in fact function under this per use system?

A Oh, yes, it certainly would.

Q This may also be clear but just to make absolutely sure, in your opinion, would a system which permitted direct licensing such as the per use system you have just discussed, or the system in which ASCAP and BMI were enjoined from licensing television networks be more competitive than the present system?

A There is no competition under the present system. That would be a system of price competition.

Q You said earlier that price competition is a means in our economy of achieving an efficient allocation of resources.

Would that happen in the market for the licensing of performance rights to television networks under the per use system or the system in whic ASCAP and BMI were enjoined from licensing television networks?

A Yes, it would.

Q Can you explain that?

A I think the first thing to look at is the opportunities that would then be open to the packagers.

Under the present system what happens is that although the network pays for performance rights in the form of its payment for the blanket license, the amount paid for music is not presented to the packager in the form of prices that he can use to make trade-offs between different types of music and music and other in-puts.

From the point of view of the man making the decision in producing programs, any incremental use of music comes to him at zero and there is no different between the cost of using one song rather than another. This is a situation in which prices have been artificially divorced from the decisions of users. They don't fulfill their usual function under competition of providing apropriate signals for the allocation of resources.

Under the per-use system or under the -- if I can, for short, call it injunction system, that wouldn't happen.

As the three producers who testified here have testified, under that system music would be bargained for by them in the same way as other inputs are now bargained for. They would be able to make trade-offs

between different kinds of music and between music and other inputs. If in their creative judgment it would be more efficient in the sense of producing a better quality program for a given budget to use more dancers, more script -- not more script, better script -- better scenery, than to spend the money on music by using less music, they can do what they cannot now do, which is to get some money to spend on those inputs.

Similarly, if in their judgment they would rather use say Song A than Song B, under the present system they certainly will use Song B rather than Song A, because there is no gain to them to go into the slightly less preferred choice.

But under either of the competitive system, if song B were prices less, they would have an option. They could go from Song A to Song B and if they thought it was worth it, use the resulting saving in money for the spending on some other kind of input. That would be a system in which they are able to make efficient choices based on prices for the use of the resources that go into a television program.

Now in addition there would be some more effects. Under that system, something would happen thtat doesn't now happen, namely, given the choices which packagers make, the rewards to music and to music writers would be

affected by their ability to compete the way all other commodities compete, the way all other inputs compete, on a price basis, with other program inputs.

If packagers chose to spend less money on music and use it on other program inputs, that would mean by definition that other program inputs were better suited to their needs and it would be then the case that the -- how shall I put it -- the suppliers of other program inputs would be relatively encouraged, something that cannot now take place when that opportunity doesn't exist.

On the other hand, also it would be the case that the producers of music in that situation, when they are by hypothesis serving the packagers' needs less well, would be somewhat discouraged.

That is what is supposed to happen in a system in which competition produces an allocation of resources directed at the satisfaction of customers.

BY THE COURT:

Q Would you care to comment on this thought that is going through my mind. I am not suggesting you give your answer, but I am asking the question: Of course any time anybody pays for anything in a sense it contributes to the allocation of resources by making a decision that

it is worth it to him to do it, and the networks today do pay X dollars for a blanket license and in that sense they allocate that much of their resources to the purpose of providing music to televise.

Can you distinguish for me the effects which you believe the new system would have on allocation of resources from the effect which the present system has?

A Yes, I will try.

Q I think I may know the answer, but I would like to hear it from the expert.

MR. HRUSKA: So would I.

A I think there are a couple of ways in which it is different. Perhaps the simplest part of it is that under the present system, the decision as to how much to pay and the decision as to how much to use are vested in different people.

Q Right.

A The producers, whose business is to put together the best quality program for a given budget, don't have music in their budget, and the decision on how much to pay for music is made at a wholly different level.

The second thing is even if it were made at the same level, in a structure I find -- I don't want to make up -- there would be an additional point which is that

the decision of how much music to use doesn't affect the price of how much is paid. The result of that is that the decision, how shall I put it, the choice in the cases in which it occurs in practice to go from the use of music to the use of other inputs is not made at a basis at the margin, contributes to the encouragement or discouragement of resource allocation.

Furthermore, there is an issue as to the allocation of resources in the production of different types of music. At present all music costs zero from the point of view of the man who uses it. That leads to a different set of uses than would be led to if music were priced in a way that he could save money by going through one sort of thing to another. In particular, since tried and true tunes, relatively standard works, works by recognized composers, cost in the eyes of the user, the same amount as relatively untried works, assuming that there is some risk to using relatively untried works, he has no incentive to do so.

In a system with price competition that can be overcome by pricing untried works below the price that can be commanded by relatively more standard works.

BY MR. HRUSKA:

Q On that last point, Professor Fisher, do you

think that that would provide any new or increased incentives to new and unknown writers of music?

A I think it would. They would have had an opportunity to break into the market on a price basis.

Q Again, so I am absolutely clear on this, do you think in this competitive system that relative prices would come to reflect relative values?

A Yes, I do.

Q Would a television packager of a television program have to shop around for music for there to be price competition?

A No, just the fact -- thought he might choose to shop around, but the fact that he is able to shop around and to go for lower prices provides an inducement for price competition on the part of the seller.

Q Under the per-use system, would the price of music performance rights in your opinion in direct licensing transactions fall to zero or some very low level?

A No, it would not.

Q Why not?

A Well,as I think I discussed before, copyright owners would own the rights to something of peculiar value will know that fact. They will know that when a producer calls them, the producer has some particular need for the

song, that the time in which to make substitution is limited, the extent to which he is locked in is -- that he is locked in, to some extent. They will be able to command a price for the song just the waythe market for movie performance rights now functions.

I recognize from reading the transcript, your Honor, that you are sick of hearing about Happy Birthday, but it comes to mind as an illustration.

THE COURT: We have had a pretty good since then.

You can go ahead.

THE WITNESS: I shall try to avoid singing it if I may, but Captain Kangaroo I know sings it on CTN at the beginning of every show, and I believe one of the packagers testified of a situation in which he didn't want to pay the high price for Happy Birthday in synchronization rights fee; and he substituted He's a Jolly Good Fellow.

THE COURT: Yes.

THE WITNESS: Now, that's not going to go down with my children if Captain Kangaroo does it.

THE COURT: You will have to go back to the London School of Economics.

THE WITNESS: In that situation, the mysterious copyright owner for Happy Birthday has a bargaining

counter of some power to use with the producer of the Captain Kangaroo Show.

THE COURT: He has got a kind of monopoly.

THE WITNESS: Yes.

A I think another example other than the market for movie performance rights might be the market in which celebrities sign endorsements. That's a situation in which the celebrity is doing something that has no manufacturing cost, so to speak, but he is giving up something. He is giving up the opportunity to endorse similar products in the same line of business. Similarly, copyright owners who have their songs performed on a given network in a give period of time are giving up the opportunity in effect to have it performed either on the same network or other networks in a surrounding period of time. I think one of th producers testified that Carol Burnett is not going to sign what Julie Andrews sang last week.

In the endorsement right market, the man who is signing the endorsement has something that the buyer wants and he commands a price for the thing which the buyer wants, and I think that would happen also in the performanc rights market.

Q What is the significance of decisions by program packagers not to use particular compositions that have been used recently on other television network programs?

A It means that a copyright owner can't be saying to himself, well, Imight as well give this thing away for very little because giving it away now doesn't affect my ability to sell it a little later on.

It doesn't affect his ability to have it performed again. It means he is only a relatively few opportunities during a given space of time to get this thing performed and he is going to want to demand some return for that.

THE COURT: For a given period of time, could you describe it as having a limited useful life or --

THE WITNESS: I could, indeed.

THE COURT: Of course, it may have a new useful life next year.

THE WITNESS: Yes, indeed.

"White Christmas" seems to do that about once a year.

Q Have you seen anything in the materials you have read in this case indicating any attitudes on the part of copyright owners which would have a bearing in your

judgment concerning prices?

A Well, other than the testimony both at the trial and at the deposition about the market for movie performance rights, several of the, I think the writers at their depositions were asked whether they would give the song away fornothing, whether they would listen to an offer for a couple of hundred dollars and they said no, that is essentially nonsense; they wouldn't even talk about it.

THE COURT: Can't you imagine some --

MR. TOPKIS: I was going to say, your Honor, that the admissibility of this testimony by Dr. Fisher will of course depend on the predicate, namely, any depositions having such testimony.

THE WITNESS: Well, I have --

MR. HRUSKA: You can talk about it on cross.

THE WITNESS: I was going to say, I can find where the testimony is, if you would like.

THE COURT: Let's not interrupt your line of thinking now. Mr. Topkis can ask Mr. Hruska to do that during the lunch hour or something.

MR. HRUSKA: Or he can bring it out on cross.

THE COURT: Yes.

I wanted to ask you whether you think that no composer or publisher will ever give away his copyright,

the use, that is, of his song, for nothing or whether it will simply occur so infrequently as to be minimally or, as the legal phrase goes, de minimis, with regard to the function of the market or whether if he doesn't, and I can envision him doing it, a young composer wanting to be played on CBS, he does it because he thinks he has got something of equal value in return, namely, the exploitation of his music.

In other words, am I correct in assuming that you don't think that it will literally never happen that a composer will give his music away but if he does, he will give it away for reasons which he considers to be worthwhile.

THE WITNESS: Well, I certainly think that composers won't give away their music except for reasons which they consider to be worthwhile.

I guess I could imagine a composer being suddenly moved by philanthropic purpose, although perhaps not toward most programs on CTN.

I can imagine a situation in which, as you say, young writers, wanting the exposure, would offer the songs for very little. That would be one advantage of having a competitive system -- which is, they could provide incentive for doing that.

THE COURT: Sure.

THE WITNESS: I think there has been some testimony that at present music used on CTN typically does not involve songs which are, you know, have not -- are climbing up in the -- whatever it is, the ratings --

THE COURT: The charts.

THE WITNESS: The charts. Thank you -- but songs which are at the crest of their popularity or standard

Q You referred in your testimony to the market in the licensing of movie rights. What about the market in the licensing of synchr onization rights? Would that have a bearing on your opinion concerning prices in the direct licensing of performance rights?

A Synchronication rights for television?

Q Sorry. Synchronization right sfor television, right.

A Well, at present what happens in the market for television synchronization rights, as I think we know from Mr. Berman's testimony, is that most transactions occur in a fairly cut and dried manner. They occur for a price range of --

THE COURT: $50 and $150.

THE WITNESS: Thank you.

A (continuing) Some transactions like the Beatles'

music or the famous Happy Birthday transaction, occur rather higher.

But of course, in this market what is happening is that copyright owners know that if their music is played on CTN, they will receive a fairly substantial sum of money which works out to, I believe, about $800 for the publisher and writer together, for a feature performance.

In that situation they have got incentive to get the music played and you would expect to see the price for the synchronization right very low. They can't get it below zero; they can't pay the network to have the music perform.

So, in order to get it performed, one would expect, as I say, to see the price at approximately zero.

Now, it is not in fact zero. It is $50 to $150. That I think reflects the fact that copyright owners know that -- I think one of the producers testified -- it is a nuisance to the producer to have to make a lot of phone calls.

If the price is down in that range, the producer isn't going to bother to shop around because the amount of money he can save by doing so isn't very much.

He can't save the whole -- if somebody prices it at $150, the most the producer can save is $150, which

is quite different from the $950 that it is worth to the copyright proprietor.

I think in that situation what happens is that some people have done what is something like the equivalent of exercising withdrawal right in the per-use system.

People who really think that they can get a lot of money, even competing against essentially zero prices for everybody else, have withdrawn and bargained for higher amounts of money, so that there is in that sense some competition on the upside, but there is no competition on the down side, because there can't be; you can't get the prices for synchronization rights down to where there is competition in the entire package.

End 4A

Q Take a synchronization right fee of $50.

Do you have any opinion as to why it is that a copyright owner would seek a fee of $50 or why he would get it?

A Well, I think the copyright owners, like everybody else, would probably rather have more money than less and I think he would try to get as much as he could.

In setting the synchronization rights fee, he would have to be aware of the fact that if he set it too high, he might drive the customer somewhere else but, as I testified a little while ago, $50 presumably looks to copyright owners -- it would be rational for copyright owners to look at something as low as $50 as unlikely to be worth the while of producers, who have already made some commitments in the direction of the songs they want, to look around.

Q You mean it is a nuisance value?

A It is essentially a nuisance value.

Q Are you familiar with the testimony given by Mr. Berman of the Harry Fox Agency regarding the general instructions that copyright proprietors have given the Harry Fox Agency?

A I have read it.

Q Regarding sync rights prices?

A I have read it.

Q Do you think that has any bearing on this?

A Well, yes. I think what it shows is that those are not in some sense serious negotiations. Those are negotiations which go on at a level at which, except in exceptional circumstances, the copyright owner doesn't want to be bothered negotiating-- he doesn't have to negotiate-- and the producers are not going to find it worth their while to negotiate for sums so small.

In that situation, it is natural to find general instructions that say, generally, well, if it goes for the regular price, don't bother me.

It is not, I must say, clear to me why the regular price should be $50 instead of something less but I am not surprised to find it is something small.

Q In your opinion would the per use schedule of rates either negotiated by the parties or set by the Court operate as ceiling prices?

A No, they would not operate as ceiling prices because of the right of withdrawal. There can't be a ceiling price on something that isn't under the ceiling.

As I said before, if the price is set too low in the eyes of copyright proprietors, copyright proprietors will withdraw and negotiate separately and the only reason

for negotiating separately is that they think they can command higher prices than the per use rate.

The per use schedule can't set prices for anything that is not under the per use schedule.

Q Now, one of the elements of the per use license proposed by CBS in this case is that the copyright proprietor may withdraw any one or more of his songs from the per use license on reasonable notice and that presumes they withdraw on notice, rather than instantaneously.

Do you think that that is economically fair from the standpoint of the copyright proprietor?

A Yes, I do. There has to be some notice, not instantaneous withdrawal, or else the whole system runs into the problem of music thathas already been taped and is about to be performed when the withdrawal occurs.

But also that is what makes it fair to the packagers. But it is also, it seems to me, fair to the copyright owners because if they think there is any reasonable possibility, any possibility at all that they can command a higher price than the per use rate for their music, all they have to do is withdraw and leave their name and if they think that in general there won't be any such use but they don't want to take the chance, all they have to do is withdraw and leave their name and when the phone call

comes all they have to do is say, you can have it for the per use price, or whatever price they choose to name.

It essentially costs less to them to do it and since it is their own option whether to do it and since they get that option at relatively frequent intervals, I think it is fair.

Q I think you have touched on this subject to some extent before, Dr. Fisher, but let me ask you, in your opinion does the present blanket system of licensing performance rights to television networks achieve the goal you described as the efficient allocation of resources?

A No. The present system distorts the allocation of resources.

Q Why is that?

A Well, it is essentially the opposite of what would happen under a competitive system.

At present, it is not the case that packagers making choices can efficiently vote with those choices at that counter in the marketplace. They can't save money on music and use it on other inputs. In effect, they can't save money on other inputs and use it on music, for that matter. They can't save money on one type of song and use it on another.

In that kind of situation, there is undue

encouragement of music versus other inputs, there is undue encouragement of certain kinds of songs versus other kinds of songs that don't have the opportunity to break in and compete on a price basis.

The essence of the allocation of resources and the way in which price competition accomplishes it is the use of price as a signal to reflect customer votes; that doesn't happen under the blanket license system.

Q When you have got a single television packager who is making a decision as between two or three songs, let's say, on a price basis-- say we are in a competitive system-- that particular decision is kind of a small decision as between just a couple of songs?

A Yes, it is, Mr. Hruska, but everybody's vote counts and it is the accumulation of hundreds of those decisions that can have quite a large impact on the allocation of resources.

MR. HRUSKA: I am about to turn to a new subject, your Honor, if this would be a good time for a break.

THE COURT: Yes, it would be.

(Recess.)

Q Is there any way, in your opinion, by which the CBS Television Network can bring about a competitive market by direct licensing without court intervention?

A No, I don't believe there is.

Q Why not?

A Well, as I testified earlier, it is not economically rational for the CTN or any other television network to go into the direct licensing business while holding its blanket license.

That means paying twice for the same music. That means that in order to bring about a competitive system by by-passing ASCAP and BMI, CTN would have to give up its lbanket license in some form.

There is more than one way in which it could do that. Let's start by discussing the case in which CTN gives up its blanket license and then proceeds to try to direct-license on a catch-as-catch-can basis, so to speak.

What would happen? Well, as opposed to the per use system, let's say, there is presently no machinery available for doing that.

I think the packagers testified that they could call up somebody, and the first person they'd get would be a secretary, and eventually they'd have to get to somebody who was not used to negotiating for performance rights.

What I am saying is that if nothing else, to begin with,people aren't used to making that kind of negotiation.

The second thing I have to say about that is that CTN would be under some substantial time pressure.

I am assuming that in this situation ABC and NBC retained their blanket licenses so that it is not like the system in which everybody is in the same boat because there are no blanket licenses at all.

In that situation, CTN is going to be at a competitive disadvantage if it can't license the music it wants.

I think Mr. Sipes said that the other networks would gladly stand by and watch him destroy himself, and the packagers testified as to how they would be hampered, not to say distressed at the prospect that negotiations would be at best difficult and at worst, impossible.

Guest stars with many other opportunities, if they couldn't sing the music they wanted to sing, would go to other programs, sing in night clubs, take other opportunities.

If the situation went along enough packagers would take their ideas elsewhere to the networks that were not hampered in that version by the lack of a blanket

license.

What's more, it would be the guest stars with the most opportunities, the guest stars most in demand, and it would also be the packagers with the best programs who are best able to sell them elsewhere who would migrate.

What I am saying on this point is that unless CTN would set up a direct licensing system reasonably fast, it couldn't possibly expect to do this.

Moreover, there is another problem that goes together with the problem of transition. That's the problem of music in the can and of advertiser-owned music.

MR. TOPKIS: Advertiser what?

THE WITNESS: Advertiser-owned music.

A I don't mean they own the music. I mean they have recorded songs to be used, music to be used in commercials.

THE COURT: Commercial music, is that right?

THE WITNESS: Commercial, right.

A (continuing) Advertisers who had trouble negotiating would want to take their advertisement elsewhere. Copyright owners, faced with music in the can, which now has to be negotiated for separately, would have a lot of leverage in dealing with CTN.

It is true that in the established order there

are cases in which rights are negotiated for after they are already in the can, but that's in the context of long-established ties and long-established ways of doing business.

The present one is a system in which long-established ties are being broken by an attempt of CTN to upset established ways of doing things. In that situation, it seems to me to be rational for copyright owners to use some of that leverage.

THE COURT: Just to make the record clear, so that six months from now we won't think you meant something else, when you said the "present system," --

THE WITNESS: Blanket system.

THE COURT: Well, I think a moment ago you said the present system, referring to the one that we were presently discussing rather than the one that is presently in effect.

Would you read back Dr. Fisher's last answer or two so we can make that clear?

(Record read.)

I take it I am correct that in your reference to the present system, you meant the system you were discussing and not the system which is actually in effect?

A Yes, you are quite right, your Honor.

Now, I think there has been a good deal of

testimony which shows that for whatever reason writers and publishers like doing business the way they have always done business, that writers would be in effect very unhappy with deals made outside of ASCAP.

Now, I think there are probably several reasons for that, but whether it is because they don't like price competition, or whether it is because writers prefer to operate through a society in which they have half the board, in a way, does not matter, because what would happen in the event of a CTN attempted by-pass would still be that CTN would have a very short time in which to change the way in which things have been going on, and writers and publishers would I think quite naturally show great resistance to changing those ways, particularly because it is not hard to figure out that if CTN does not succeed in a relatively short time, CTN will have to go back to ASCAP and a blanket license system.

So that it is not a matter of standing out in the cold and saying "Well, this is the way it is going to be. I should do this because this is the wave of the future or this is what's coming, I better get used to it, that's the way it would be under an injunction system or per use system."

In an attempted by-pass it would be a matter of

saying "Why does it have to be this way? It's never been this way. Why don't you guys go and negotiate through ASCAP and what's more, if I think about it, I know this isn't something I have to do because if I wait a little while I know that these people across the bargaining table from me will in fact be negotiating with ASCAP."

THE COURT: Would you say the difference between what you described under the by-pass system as opposed to the injunction set up, would be comparable to the difference in the negotiations taking place between Penn Central and its union when they are not required to reach an agreement on the one hand, and when they are required to reach an agreement by compulsory arbitration or the postponement, a cooling off period and so on?

Perhaps it isn't terribly important but I press that an analogy. It occurs to me - in the one case one of the parties at least knows that they can cause severe damage to the other and the other has a sheltered environment in which that can't happen.

THE WITNESS: I think in that respect, that is right.

THE COURT: Let's go on.

A What I have said so far is that given the time pressure on CTN, and given for whatever reason the reluctar of publishers and writers to deal outside of ASCAP, the publishers and writers won't have to deal outside of ASCAP, CTN can't hold out for very long. CTN will have to be forced back to ASCAP.

In fact, I think there is probably more to it than that. I think that there is evidence in this case that publishers and writers understand fairly well the difference between price competition and no price competition, and that it is not merely a reluctance to do business out of the old-established order, but it is in fact a reluctance to expose themselves to price competition

I think that evidence comes in large part if one looks carefully at the reactions of publishers and writers to the 3M incident.

I'd like to -- if Mr. Kruska is going to ask me about that or I will ask myself.

Q I would ask you about that now.

A I thought perhaps you might.

Q Go ahead and ask yourself.

MR. TOPKIS: Y our Honor, this seems to me more like a summation than testimony.

THE COURT: Well, I assume that your expert will

express his views with equal flexibility.

I assume that and I am perfectly willing that he should, but as to the subject we are now approaching, certainly it seems to me that it is central to the case as presented by CBS, but a question by Mr. Hruska to the status of Dr. Fisher's opinion that the 3M incident illustrates the publishers and writers are economically hostile to a per-use system, would be a permissible question, so we will go along on that basis.

MR. TOPKIS: May my objection be noted, your Honor.

THE COURT: To the question, you mean?

MR. TOPKIS: To the question and to the line of testimony.

A Yes.

THE COURT: Yes, of course.

Q Could you answer that question, Dr. Fisher?

A Well, 3M offered the copyright owners new money. They offered them an opportunity which -- to earn fairly substantial amounts of money in a new area in a way in which doing so would not upset the established order of dealing in the performance rights market.

A man who -- a copyright owner who signed up

with 3M was going to get money and if he didn't sign up with 3M, given the 3M and ASCAP and been unable to reach agreement, he wasn't going to get money, and the amounts of money in some cases were fairly sizable.

In this situation, 3M encountered a certain amount of difficulty on the part of publishers who refused to deal, said they refused to deal, for example, as a matter of policy.

Essentially every publisher they went to wanted to know first whether there was any chance of their getting together with ASCAP.

That was a different situation. 3M only wanted a limited number of songs, didn't want access to the vast requirements that a television network would want access to, and as I have said -- and 3M wasn't under any time pressure particularly, whereas CTN would be negotiating in a television in which time pressure was very important.

To the publishers dealing and refusing to deal with 3M either they were going to deal with 3M or the money was going to go away.

There wasn't much in that period prospect that 3M was in fact going to use their music by going through ASCAP.

That is as opposed to the situation which I discussed a few minutes ago, in which if CBS doesn't succeed in dealing directly, it will in fact have to go back to the blanket license system.

The publishers who dealt with 3M found that there was a certain amount of excitement on the part of their colleagues. Mr. Brettler said, I believe, life is simpler, if you don't have to go through that sort of afternoon.

THE COURT: I wanted to stop you to understand that I am taking this recital as the witness's basis for his opinion, and not as a statement of essentially what the record says except to the extent that I find that it is what the record says.

MR. TOPKIS: All right, I appreciate that, your Honor. Thank you.

A He said he sat at the ASCAP board table and he saw canon balls coming down at him from the other end. He later changed that to harpoons. There was a heated discussion for a few minutes about "What are you fellows doing?"

He went out for coffee with one of his colleagues and there was apparently quite a heated discussion, and he rationalized what he was doing and he said that -- to

him self he said this in testimony, -- I don't mean to suggest that he said it at the board meeting -- he said it was experimental use, if he didn't do it somebody else would, and in any case eventually he figure 3M would come back to ASCAP.

And that is not the only place that, you know, there is evidence of consciousness that something is happening, I think, to break the system.

The writers got relatively exercised about it. The West Coast Committee of AGAC, if one believes the letter that Mr. Spinner wrote back to AGAC, had a meeting, and I recognize that Mr. Lane testified that the West Coast Committee tended to be hysterical, but this was a subject that they tended to be hysterical about, apparently, and Mr. Spinner's alert was pretty explicit about what was going on.

He wanted a system organized in which the writers would put pressure on the publisher to in turn force 3M back into negotiations with ASCAP, and he used, I think, quite explicitly the phrase that he was worried about what was going to happen to the whole structure of performing rights.

Now, that strikes me as not unreasonable, a

phrase used by a man who is quite conscious of the fact that not only is there going to be a new way of doing things, but that this is going to be a rather upsetting way of doing things in the sense of introducing price competition to a market in which it hasn't been before.

End 5B

use it on another.

In that kind of situation, there is undue

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THE COURT: That's a very interesting analysis of what your reaction is to that testimony in a general way.

Can you tie it a little more closely with what you feel to be the economic aspects of it and assume the effect they will have on the issues here?

THE WITNESS: Well, I can. Let me say this, your Honor. The principal problem economists in general recognize, the principal problem in holding a cartel system together, is what to do about incentives to individuals to cheat, to break the price, to engage in price cutting or in direct negotiation.

In that situation, one expects to see a cartel held together by some kind of mechanism in which the protection against breaking the system resides in a place or a group of people whose inteerests are the interests of keeping the system together, rather than the interests of individuals.

Otherwise, there is a tendency for cartels to break up, somebody to go out and get more business by undercutting the price or doing something else.

Well, in this situation, I think that role is played to some extent by the writers. It is played by AGAC who have in their standard contract, widely used in

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the industry, a provision which not only requires the writer's consent before the publisher can give a license outside of ASCAP and BMI but --

THE COURT: I think it is a license for a block, isn't it?

MR. HRUSKA: No, your Honor, the contract requires writer consent for individual licenses to television, but AGAC and writer consent to bulk or block licenses.

THE WITNESS: I think the thing that is significant about that is that block licenses are the sort of thing that facilitate direct dealing by a television network in the event of a bypass. It would be relatively simpler for a television network to go to a publisher and say, "Okay, let's make a deal for your catalog while I am trying to do this." Instead of trying to negotiate on each song--

THE COURT: You mean a mini-blanket license.

THE WITNESS: A mini-blanket license at least to get it started.

And here we find that not only is the writer's consent required to do that, but AGAC's consent is required and AGAC's interests have got to be the interest of keeping the system together.

I think in that circumstance, it is at least consistent with that view that Mr. Finkelstein, who is

I think at the center of the system, said that if he were AGAC's general counsel he would have provoked a lawsuit on that subject against his own members.

There is other evidence of consciousness --

MR. TOPKIS: There is just no testimony on that subject.

THE COURT: I don't think that anybody challenges Mr. Finkelstein, if he were the Prime Minister of Great Britain, would not have been appointed for the purpose of liquidating the Queen's Empire, but I don't think that is necessarily a legal concept.

THE WITNESS: I understand that. At least I think I do. But it is interesting that the place he looked to hold the system together was to the writers and I think it is the case that publishers had in the nature of it, for whatever reason. I mean putting aside the question of the fear of price competition for the moment, although I think there is, by the way, some clear consciousness on the part of the publishers for that and some stuff I haven't mentioned, but publishers for whatever reason have got to be very worried about the fact that their writers do not like dealing outside of ASCAP.

Whether the writers don't like it because they

don't like it, because they don't trust the publishers or because they are afraid of price competition doesn't seem to me to matter very much. Publishers have to worry about the reaction of their writers.

In the late thirties, Warner Brothers left ASCAP and the result of that was, in part, the migration of the best writers out of Warner Brothers. That is a prospect which I think any publisher would rationally view as a serious problem, and it will make him very reluctant to deal separately.

THE COURT: All right. Let's go on.

Q In your reading materials, Dr. Fisher, have you seen any other evidence which has a bearing on the judgments which you have just expressed?

A Yes. There is a lot of consciousness, even with regard to something as essentially extra and trivial as the 3M incident, a lot of consciousness of the necessity of holding together against an attempt to produce competition and that evidence is expressed with regard to the question of direct licensing of TV performance rights.

Mr. Brettler said at his deposition that would be self anihilation. Mr. Morris said that would be the end of the road for me as a publisher, referring to direct licensing.

There is the Spinner letter about the whole structure of performance rights. There is a speech by Mr. Adams, the president of ASCAP, about the necessity to stand together under the same umbrella, that somebody who deals for himself is putting a rent in the fabric of the umbrella and letting the rain come pouring through and nobody can walk in the rain and not get wet.

Those are the kinds of statements, I think, one expects to see, certainly economists expect to see, from people who are fairly conscious of what is going on and of the fact that competition is going to be a very different world and they are not the kind of statements one expects to see from people who are going to deal very readily with CTN, FCTN attempts to break that system in a relatively short period of time by bypassing ASCAP and trying to get its music catch as catch can.

Q Now, you alluded before to a bulk or block licensing system. I would ask you to assume these facts:

(1) The CBS television network announces to the world that it is its intention at some fairly proximate date in the future to cancel its ASCAP and BMI licenses and that in an attempt to pave the way toward that condition, the network plans to approach music publishing companies and writers with an eye toward optioning the

catalogs of those publishers and writers and the basic structure of the transaction which the network would offer to the copyright owners would be (1), an option which would be in the hands of the CBS television network, and exercisable by the network at some point in time -- that is, when the network had enough options to make this arrangement go -- and the right in the network to use the music covered by the option at stipulated per use fees.

Now, do you think that the CBS television network could bring about a competitive system by pursuing that course of action?

A No, I don't.

Q Why not?

A Well, in this situation, as I understand it, CTN would be, as it were, buying up options, exercisable in effect if the system went, if CTN succeeded in getting enough of its -- enough options together, it would drop its license and go with the music it had accumulated.

Now, the first thing I think is that in order -- it is rational to suppose that in order to get somebody to give you an option for something, you are going to have to pay him something for it, and the amount of money which you pay him is going to go out and if the system doesn't

go, it is going to be money down the drain.

Now, the first thing I think to -- say it is rationally supposed that copyright owners are going to demand standing up front money for that kind of option, I think it is fair to say, and that there is a tremendous risk, that if the system doesn't go, the money will go down the drain.

I would like to talk about that first because--although I think there are problems even if the system does go, with that amount of money.

I think, the reason I think the system -- there are several reasons why I think the upfront money is going to be substantial. This is apart from the technical question as to whether AGAC would sign the appropriate bulk agreements.

In the first place, publishers who deal in this manner run the risk that they are going to break the system which has always existed.

For whatever reason, other publishers and other writers don't seem to like the attempts to deal directly. That means that whether or not CTN actually succeeds in amassing enough such options, it is going to turn out that publishers who sign are going to be subject to a certain amoutn of opprobrium and pressure.

If they are wise, it seems to me it would be rational for them to demand some money in return for withstanding that kind of pressure, which they will have to withstand, even if the system doesn't go.

That is perhaps a relatively minor point.

I think more important than that is the fact that there is ample evidence, as I think I already said,

that writers do not want to deal outside of ASCAP. They are very resistant to that.

Publishers are going to have to be conscious of the danger that their writers are going to be upset.

One possibility is that writers will be upset because there is a large amount of upfront money and no way which can be seen to be fair for the publisher to divide it.

Another way -- another reason for writers to be upset is they don't like competition.

Another reason why writers would be upset is simply that they don't want to deal outside of the established order.

A publisher who signs that agreement, that option agreement, even if the system doesn't go, is running the risk that his writers are going to migrate away from him. That is a substantial economic risk and it seems to me to be rational that publishers would want to demand compensating rewards in the form of upfront money.

Beyond that, publishers who sign are in fact helping to bring about a system of price competition. They are exchanging or helping to exchange a system of relative certainty which has gone on for a long time and which they can know pretty well what's going to happen to

them, for a system of relative uncertainty; a system in which they are exposed to competition, they don't know what their incomes are going to be; they really can't tell what's going to happen.

In that situation, it would be rational for them to demand enough money to compensate them for bearing that uncertainty, for bearing that risk and for helping to bring about the destruction of the system and the destruction of the system would not be just in the amount of money they would or would not receive from CTN because I think it would have to be plain to people who signed the agreements that if CTN were successful, ABC and NBC wold soon follow and the whole present structure of the performing rights system would disappear and competition would ensue.

I think in that case, CTN would have to end up paying for those options which, if the system did not go, it would be money down the drain, large amounts of money, to induce the copyright holders to come out from, as it were, the shelter of the present system into the rain from competition.

I think the publishers show some consciousness of that.

I think Mr. Morris in his deposition said that you would have to give me enough money to take care of me for the

rest of my life and I think that is probably exactly what you would have to do to induce a large amount of publishers to sign this thing. This would be large amounts of money at risk.

Now, suppose, however, that the system did in fact succeed, what would happen?

THE COURT: You mean you got enough options to make it?

THE WITNESS: Yes.

THE COURT: Like a tender offer to security holders?

A You get enough options to go and the options are exercised.

Incidentally, one of the things that would happen is during the period in which the options were exercised, since the options would have to provide for a schedule of rates at which the songs could be used, those rates would certainly serve as ceiling prices during that period.

What's more, even if this brought about a competitive system, you would have had to pay a very substantial sum in order to, as it were, liberate yourself from the non-competitive nature of the present system and in part, I think, to liberate the other television networks as well.

Moreover, at the end of the time for which those

option agreements expired-- end of the time for which the option agreements held, there would come a time at which they expired.

At that moment, it would really depend how used people were to dealing in a competitive way -- there would still remain the residual risk that at the end of that time you would be back where you started, that writers and publishers would say, "All right, we have done that, we don't like it, now let's go back and deal under ASCAP in the old way."

So I think in order for CTN to do that, they would have to put up a large sum of money; a large sum of money would almost certainly have to be up front.

If the system didn't go, the money would be down the drain.

If the system did go, they would still have paid large sums to do it and there would still remain the risk that it could not be done.

I don't think a sensible--

THE COURT: I suppose you expect that if the options were given in the first place, they would have to be for a relatively short period of time; unless the publishers received a great deal of money, they would not be interested.

THE WITNESS: Exactly.

If it were for a long period of time, they would have to receive a great deal of money and make it more expensive to do. If it was a short period of time, there would be a greater risk that if the system went, it would not last.

Q How would you assess the risk to CTN of embarking on such a project?

A I think they would have to be prohibited.

Q Have you, as a result of your reading, Professor Fisher, come to an understanding of the per program license?

Do you know what I mean by the phrase "per program license?

A I do, yes.

Q I'd like you to assume a per program license by ASCAP to CTN which has these basic features:

No. 1 --

THE COURT: Are you assuming a per program license is any different from the actual one?

MR. HRUSKA: Yes, I think, your Honor, I'd like to simplify for the purposes of this question, the per program license, that is, simplify it in relationship to the one that is actually in evidence.

There is a per program license that we did bring out during the direct examination of Mr. Sipes. That was the license ASCAP had issued, had negotiated with the all-industry committee for television stations.

I think the evidence also is now that there is no or one television station in the United States that has them but that particular license had a provision in it which we referred to in the Sipes testimony as the escape clause, which was limited in terms of subject matter;

that is, movies, and electrical transcriptions, and also had the requirement about the seven days' notice in writing and the fact that all publishers and writers having an interest in this song had to consent to the direct license.

I am presuming when those conditions were met with respect to all the songs used on a particular program, that the escape clause came into effect, and the 9 per cent fee was not paid.

I would like to remove the special problems of those limitations of the escape clause, and simplify this for the purpose of eliciting Dr. Fisher's opinions regarding the per program licensing system.

THE COURT: I have no objection to simplification so long as the question is asked with regard to something that is a reality.

If your purpose is to demonstrate, as I assume at this moment that it is, that the defendants' suggestions during the course of the litigation --

MR. HRUSKA: Right.

THE COURT: -- that a per program license supplemented by direct dealing is not feasible, then I think questions have to be asked in relation to the per program license which exists or would existunder the present agreement.

MR. HRUSKA: Fine.

MR. TOPKIS: It would have to be "would exist," your Honor, because there is no network per program license.

THE COURT: It would have to but I am talking about a hypothetical contract. It is a hypothetical contract whose terms if entered into were already specified.

MR. TOPKIS: No, your Honor, that is not so. The amended final judgment speaks in general terms of a per program license. It does not particularize the terms and conditions of it.

Those would have to be worked out presumably if ASCAP and the network ever entered into a per program license but there is no form in existence today.

MR. HRUSKA: For a television network. There is only this form for television stations.

THE COURT: Then I will ask Mr. Hruska to propose a hypothetical that would at least come within the factual realities of the situation.

MR. TOPKIS: Right.

MR. HRUSKA: I would have to do that, though, your Honor, with a qualification, in that I would have to say that we don't really believe that the simplified per program

license that I was about to describe to Professor Fisher is reality in the sense we don't believe ASCAP would grant such a license, but for the purposes of meeting what I believe to be ASCAP's --

THE COURT: I am not assuming that the question asked constitutes an admission, so just go ahead and ask it.

What you are saying is if such and such happened, what do you think?

MR. HRUSKA: Right. Yes, your Honor.

Q All right, now the hypothetical per program license that I will describe to you, Professor Fisher, has these basic characteristics:

For every program appearing on the CBS Television network which uses any ASCAP music, which has not been licensed directly from the copyright proprietor by CTN or the packager, CTN will be obligated to pay ASCAP a substantial fee, and assume that that fee is higher than the prevailing fee.

THE COURT: Prevailing what?

MR. HRUSKA: Blanket license fee. That is the rate.

Q (continuing) In other words, if there was a prevailing blanket license rate of 2 per cent at the time

the per program rate would be a higher percentage of the time income attributable to that program.

Assume that if all the ASCAP music, 100 per cent of the ASCAP music, that was used on a CTN program had been licensed directly by CTN or the packager from the copyright proprietors, then CTN would not be obligated to pay ASCAP a fee with respect to that program.

THE COURT: That second proposition is really just the obverse of the first?

MR. HRUSKA: Yes, it is, yes.

Q Assume further that CTN has an identical license from BMI with respect to BMI music.

In your opinion could CTN bring about a competitive system having such licenses by attempting to by-pass ASCAP and BMI on a program-by-program basis?

A I don't believe so.

Q Why not?

A Well, in the first place, there is something artificial about these immediate situations that would face the packagers.

THE COURT: Would face who?

THE WITNESS: Packagers, packagers who used both ASCAP and BMI music on the same program, and who did not succeed in by-passing either one of them for that program

would be paying much more for the music than would happen if they used only ASCAP music or only BMI music on a single program.

In that situation either the network or the packager is going to find it, I should think, quite risky to start out using both ASCAP --a substantial amount, anyway, of both ASCAP and BMI music on the same program, and there is going to be an artificial segmentation, or pressure toward artificial segmentation of the way music gets used.

Putting that aside, consider what happens to a packager or to CTN where with respect to a particular program on which ASCAP music is exclusively used, he attempts directly to deal.

Well, I think Mr. Sipes described this as a series of hurdles he has got to get over and I think one of the things to note about it is that even if you get over the series of hurdles, a subject I will get back to in a moment, even if you get over lthe series of hurdles, you have got the same hurdles tojump over again for the next program.

What is the series of hurdles? He has got to put together a transaction involving all the copyright owners to the songs he wants to use on that program or else he has to pay the per program fee to ASCAP.

THE COURT: I don't know whether Mr. Hruska is hypothesizing the same fee with only one song that has not been licensed --

MR. HRUSKA: Yes, I am, your Honor. Yes, I am.

THE COURT: By hypothesis, he does.

A Yes, I was assuming that.

Either he has got to put together this transaction all at once, that is, he has got to go to each of the copyright owners and say to them, "I will make this deal with you but it is not firm unless I can line up all the other guys."

He has got to do this in a relatively limited amount of time when he is preparing a program -- his attention is drawn to something else, like one of the packagers said he thought that would just be unfeasible.

THE COURT: Either he has got to call all these people together or he has got to start dealing with them one by one.

If he deals with them one by one and he makes a firm deal, he is paying out money and he may even yet have to pay the per program fee.

That situation is a strong incentive for packagers to avoid doing this.

Moreover, the prices which he is going to have to

pay are going to be I think very affected by the presence of the per program fee.

Any copyright owner who has reason to suspect that he is either the last guy in line, or one of the last guys in line, or he may be the last guy in line, is going to know that he has got a lot of leverage in that situation; and even though he also knows that the producer if he does not deal, can go elsewhere for that song, he is going to know, I think, that the next guy making that calculation can make the calculation just the way that he can.

THE COURT: I think Mr. Sipes at one point suggested that he paid 8.9 per cent instead of 9 per cent or some such figure, just below what CTN would have to pay if it went back to ASCAP.

A I think that's right, your Honor. I think we are dealing with a situation in which there is necessarily a small number of sellers with respect to any given program, and I think one of the things we know about the market in which there are a small number of sellers is they tend to be conscious of what each other is likely to do and of their effect on each other. Even apart from the question of leverage from the last guy, it seems to me every copyright owner will find it in his interest to make a calculation that says "Here is the per-program fee, here is the number of songs this packager wants to use," the price per song is going to be, you know, the result of dividing the one into the other. That is the sensible price to charge, and he will know that ever ybody else can make that calculation.

In that situation, even if there is some bargaining, an artificial element has been injected into the competition for songs. You would expect price to settle on something highly affected by the presence of the

per program fee.

Then that gives the packager, thinking about this, relatively little incentive to go out and deal. Even if he does deal successfully, no competitive market is brought into being. There is no further competition.

As regards the next program, you have to start over again from Square 1. It is not like bypassing the whole thing and having the machinery in which all negotiations take place that way. You are no further along really when you have negotiated for the first program than you are before you negotiated for the first program, and except that you may know some more names and addresses, you are not really much further along when you have negotiated for the hundredth program than you were before.

Moreover, I think there is at least one more reason why people are going to be reluctant to deal in this situation that didn't apply really to what we discussed before, and that is the following:

The ASCAP system has in it some features which mean that individuals dealing on a per-program basis with CTN are going to lose money that is not reflected directly, so to speak, in the amount of CTN is paying through ASCAP.

Those features are two. Inthe first place, ASCAP divides its uses so to break into surveyed uses and non-surveyed uses.

ASCAP surveys the networks, in particular, to get an idea of what is being played, and it adjusts the amount of money which it gives out as the result of performances on unsurveyed music like bars, restaurants, skating rinks and so forth, by making adjustments, taking into account the survey.

Now the man who licenses CTN directly is going to find that when ASCAP surveys his use, because it surveys only uses licensed through ASCAP, he is going to count for less than the survey and that is going to result not merely in the fact that of course ASCAP won't pay him directly, for CTN's use, but there will be loss of income from unsurveyed uses which would otherwise have come to him as attributabl eto his being counted in the ASCAP survey.

Secondly, ASCAP has a feature in the distribution system called qualified works. If a work is played sufficiently in feature performances it makes a lot more money than when used for background music, than works which played less frequently.

And a guy who gets in the habit of dealing with CTN on this program by program basis, will have to consider

the question of whether the performance on CTN for which he is dealing will make the difference between his work qualifying or not qualifying.

That could be a matter of substantial amount of money to him in the uses which are paid through ASCAP. So unless ASCAP in this per program situation will wholly change the method which it uses, it will pile up credits in works not licensed by ASCAP, there would be an added incentive not to deal.

Finally, there is another big consideration and that is the following:

The per-program rate, I have been asked to assume, is higher than the blanket rate. I think that is --

THE COURT: I think we can agree it would be a higher percentage rate. It has been.

MR. TOPKIS: That is what the assumption is in the question.

Q Let me jump in then, your Honor, with this question. Is there anything inherent in the nature of a per-program license which would like you to conclude that it would be irrational from ASCAP's standpoint to apply a lower rate to a per-program license than is applied to a blanket license?

MISS KEARSE: Your Honor, I object. There is

a provision in the consent decree that any per-program license or any other type of license offered has to give the user a genuine economic choice.

MR. TOPKIS: More than that, your Honor, right now we are not getting from any of the networks a percentage. We are getting flat sums from all the networks.

MR. HRUSKA: I asked the question in terms of a comparison of rate, whether it is a percentage rate or a per dollar basis?

THE COURT: I think it is appropriate, as long as we have Dr. Fisher on the stand, and it would be appropriate for you to ask your expert too, since we have so little experience to go on with regard to what the licenses might be like if they were executed, he would expect a per-program license to be negotiated at a higher percentage of revenue than a blanket license, and if so why, and if not why.

Q Could you answer that question, Professor Fisher?

A I think if there were to be a genuine economic choice there would have to be a higher percentage of revenue use because if they were offered at the same percentage of revenue or a lower percentage of revenue than a blanket license, it will turn out that everyone will

certainly accept a per-program license because at worst they would be paying the same amount as the blanket license and they may be able to avoid it.

I can't think that it would be in ASCAP's or BMI's interest to offer a per-program license.

THE COURT: In other words, if a per-program license were at the same percentage rate it would be for partial use?

THE WITNESS: Well --

THE COURT: Never mind answering.

THE WITNESS: It would be like splitting up a blanket license.

THE COURT: You would obviously not pay for more programs than youwanted to use if you get them at the same rate per program, is there, the same per blanket?

THE WITNESS: In that sense it would be. And you know unless ASCAP and BMI want to go out of the blanket license business altogether, the sort of equivalent choice to be presented has got to involve a higher rate for the per program license.

THE COURT: Based on that answer, why don't you proceed with your next question or your last question.

MR. HRUSKA: Your Honor, I have another question

on this subject.

Q You testified before about your opinion concerning whether the per-use schedule of rates would operate as a ceiling price. I think you said it would not. Do you have an opinion or what is your opinion as to whether or not the per-program rate would operate as the ceiling price.

MR. TOPKIS: Ceiling price on what, may I inquire?

MR. HRUSKA: On the price of music for the particular program.

A Well, I think it would since the packager knows he can get the music by paying the per-program rate. It is hard to say how he would ever get himself into a situation where he would agree to pay more and he might very well find himself in a situation in which he would pay less.

THE COURT: On the other hand, would you expect the copyright owner to drive for a price as near to the per-program price or his share of it as he could?

THE WITNESS: I certainly would, and I think I said one way of saying what I said a little while ago is that the per-program price divided by the number of songs provides an obvious target for people to aim at, and I

think that's where negotiations would tend to come out, a little under the per-program rate, but --

Q Do you think there is any relationship between the fact that the per-program fee, the rate, would operate as a ceiling price and what that rate would be?

A Well, I think that that would mean, that ASCAP and BMI would find it in the interest of their members who are proposing a per-program license to propose one reasonably high and I think that the difference in rates between a per-program rate and a blanket rate provides another reason that we haven't actually gotten into it as to why it would be the case that a per-program, program by program bypass wouldn't work.

Q What is that?

A Well, suppose we consider to what extent CTN would have to succeed in direct licensing in order to come out ahead or at least in order to break even, and having done the program by program route rather than having accepted the blanket license, I have made some calculations as to how that would have to come out.

Now I hope your Honor will forgive me, but I am unable to resist asking if Ican use that beautiful blackboard on the other side of the room.

THE COURT: I am going to resist saying you can't.

THE WITNESS: Thank you. It is an occupational disease.

THE COURT: I assumed it would happen sooner or late

(Witness at the blackboard.)

A If CTN takes a blanket license -- I am sorry, I am going to have to assume by way of illustration what rates would be, although of course it is possible to make this same computation for different rates, and I have taken two per cent of revenue to be the rate which CTN would pay under a blanket license, and I gather that is approximately the historic rate, and I have taken 9 per cent to be the rate which they would pay on a per-program license because that is the rate listed in the license for individual television stations that is in evidence.

If they take the blanket license they are going to be licensing 100 per cent of their programs at 2 per cent.

If they take -- I will concentrate only on the question of bypassing ASCAP and for the moment leave BMI out of it -- let's suppose that there are some programs which CTN would have in that situation that wouldn't use ASCAP music. I don't know how much that will be, but let's give it a name. Suppose it is Z per cent, and suppose

that on Y per cent of the programs they succeeded in direct dealing, and let's suppose first that contrary to what I testified I think what actually happened, that the amount of money they paid for music in the programs in which they successfully bypassed was not very close to the per-program rate. Let's take it very far from the per-program rate. In fact, let's take it down below the blanket rate and let's assume they only pay one per cent of the revenues in the programs which they succeed in bypassi Then they are going to be paying one per cent on Y, fraction on Y of the programs, and they are going to be paying 9 per cent by assumption on a fraction which is given by 100 minus Z minus Y.

This is the fraction of the programs which contain no ASCAP music and which has not been directly licensed.

THE COURT: So far I am with you.

THE WITNESS: All right. Well, that is almost all there is, I am pleased to say.

A Now, suppose that these alternatives were to just come out even. Then this would have to be the same amount of money as paying two per cent on 100 programs.

From that it is possible to calculate on these assumptions given the fraction of programs that

don't contain ASCAP music what would be the fraction that they would have to succeed in direct licensing to come out ahead.

THE COURT: I see.

THE WITNESS: I have made that calculation on these assumptions.

I have made that calculation on these assumptions, and the reason I have got this thing in my hand is that long division is not one of my strong points.

Anyway, if you put here a percentage with no ASCAP music and we put here the percent of the total programs which must be bypassed and we put here the percent of what I will call the ASCAP programs that have to be bypassed -- that is the success rate dealing with ASCAP publishers and writers -- then what we find is the following:

CTN programs contain -- the vast preponderance of CTN programs contain ASCAP music. I think that is stipulated. Let's start by supposing there are no CTN programs that don't contain ASCAP. In that case, it turns out that in order to make the system go, they have got to succeed in bypassing 87-1/2 percent of the programs.

And that, of course, is saying 87-1/2 percent of all the programs which have ASCAP music.

THE COURT: You say to make the system go. Does that mean to come out at no greater expense than if they had a blanket license at two percent?

THE WITNESS: That's correct.

Q To make it go or the break-even point?

A That's the break-even point.

If ten percent of the programs contain no ASCAP

music, then in order to break even they have got to successfully bypass 76-1/4 percent of the total programs and that means, in that case, some of the programs don't use ASCAP music. They have got to bypass 84.7 percent of the programs with ASCAP music.

I don't want to drag this out, so I will jump to where there is as much as 30 percent of the programs that use no ASCAP music and in that case, in order to break even they still have to bypass 53.75 percent of the total programs but that still is over three-quarters, 76.7 percent, of the programs that use ASCAP music.

That means that, looking at this, if they can't expect to be successful in bypassing ASCAP when they try at least as much as three-quarters of the time, they can't expect to have come out at the end of the system even at low prices here (indicating), when they bypass, they can't expect to come out paying as little as they would pay for a blanket license.

It's not a sensible alternative for them to attempt unless they are willing to pay a fair amount of money in order to do it.

THE COURT: I take it there is no objection to having Dr. Fisher's piece of paper marked an exhibit with copies to everybody, so I can look at it some time.

MR. HRUSKA: Fine.

THE COURT: We willadmit it in evidence.

Mr. Topkis?

MR. TOPKIS: Indeed, do I gather that the piece of paper is a copy of what is on the blackboard?

THE COURT: At least the bottom part, I understand.

THE WITNESS: No, there is more on the blackboard -- sorry. The piece of paper consists of two things, Mr. Topkis, maybe the simplest thing would be for you to look at it.

THE COURT: Describe it for the record.

THE WITNESS: One is a complete table of the sort from which I have drawn three lines which contains the figures not only for zero and 10 to 30 per cent, but in between and the ot her is not quite what is on the top of the board, but it is something which states the assumptions that went into the material on the top of the board.

You can figure out what was going on from it.

THE COURT: I think after that interesting demonstration, it would be a good time for us to break

for lunch and we will be back at two o'clock.

(Luncheon recess.)

1pm

mbg 1

AFTERNOON SESSION

2:25 p.m.

MR. HRUSKA: Your Honor, this morning I had asked Dr. Fisher a question based on an assumed type of a per program license.

THE COURT: Right.

MR. HRUSKA: And your Honor had inquired as to whether the fee in that license would be the same fee for each program irrespective of the amount of music used on the program.

Simply to make the record clear, I would just like to explain the reason why that assumption was in the question, and that is a form of license in which the fee for a particular program for a direct relationship to the nature and quantity of the music used on the program which had not been licensed directly, would in essence be a per use rather than a per program license.

THE COURT: I am quite aware of that. I don't remember asking the question that you seem to think I did ask, but if I did, it certainly was not intended to convey that I had any other thought than what you described.

...

F R A N K L I N F I S H E R, resumed:

DIRECT EXAMINATION (continued)

BY MR. HRUSKA:

Q Now, before the luncheon break, Dr. Fisher, you performed certain calculations on the blackboard regarding the point at which a television network or CTN, having a per program license of the type defined, would break even with a blanket license.

I'd like to ask you to change the assumption somewhat; continue with the assumption that the direct licensing rate is one per cent, but assume that the per program rate is not 9 per cent but half that, 4-1/2 per cent.

Could you calculate the break-even point under those assumptions?

A Yes, I could.

Q Will you do that?

A Do you want me to go to the board and do it or do you want me to tell you how it comes out?

THE COURT: I think probably we will be likely to understand a little better if it is done at the board.

THE WITNESS: Okay.

(Witness at blackboard.)

THE COURT: I assume you will follow the same methodology.

THE WITNESS: Well, as before, comparing the blanket license with 2 per cent and 100 per cent of the

programs, against direct licensing with Y per cent of the programs at one per cent of the revenue, and then the rest of it, 100 per cent minus the part direct license, is the part that has no ASCAP at 4-1/2;

Working with that, we get a relationship between the fraction that had no ASCAP music and the fraction of the total programs which would have to be by-passed in order for CTN to break even, and that works out as follows:

If all of CTN's programs had ASCAP music, then it would still be the case that they would have to by-pass approximately 71 per cent of the programs in order to break even, even at 4-1/2 per cent per program rate.

That, of course, would be the same as 71 per cent of the programs using ASCAP music.

If 90 per cent of the programs used ASCAP music, they would have to by-pass approximately 58.6 per cent of the total programs or about 65.1 per cent of the programs using ASCAP music, because you still have to get roughly two-thirds of the ASCAP copyright holders to deal with them directly at a rate of 1 per cent.

Finally, if only 70 per cent of the CTN programs are ASCAP music, they would have to by-pass, I think it works out to 32.9 per cent of the total programs or approximately 47 per cent of the ASCAP programs.

You still have to get almost half of the ASCAP people to deal with them in order to get-- come out to the same amount of money.

(Witness returns to witness chair.)

MR. TOPKIS: Your Honor, I am not sure whether the record discloses if we marked the various papers the doctor has been using.

THE COURT: No, they have not been marked, as I recall. We agreed that they should be not only marked but put into evidence.

MR. TOPKIS: Fine.

MR. HRUSKA: We can do that now.

THE WITNESS: This one is simply full of scribbles.

THE COURT: Are you going to be here tomorrow?

THE WITNESS: I am, if you need me.

THE COURT: What is that?

THE WITNESS: I am if you need me.

THE COURT: I was led to believe by Mr.Hruska it was likely that you might be but in any event, I would like to have the material that is on there that is relevant to this transcribed in such a way that it be understood by us all and put into evidence.

MR. HRUSKA: We will do that, your Honor.

MR. TOPKIS: Whether or not Dr. Fisher is here,

it can surely be done.

THE COURT: That is right.

MR. HRUSKA: We could mark right now the papers that Dr. Fisher used this morning on his first demonstration.

THE COURT: Let that be marked for identification at this time and then either the original of the first piece can be put into evidence if it is in proper shape or a cleaned-up version can be put into evidence.

(PX 882 marked for identification.)

THE COURT: That is the first one.

MR. HRUSKA: The first one, yes.

Q Dr. Fisher, I believe you testified this morning that you did not consider the direct licensing rate of 1 per cent in these examples to be a realistic figure.

Assume that the per program rate is 4-1/2 per cent, and the direct licensing rate is 3 per cent, and the prevailing blanket rate is 2 per cent; is there a break-even point under those circumstances, that is, could CTN by by-passing the per program license break even with a blanket license?

A Well, it depends on how many of CTN's programs have ASCAP music. If all of CTN's programs had ASCAP music, then there would be no way in which CTN could break

even on that basis because even in that if they succeeded indirectly licensing every song they used, they would be paying 3 per cent instead of 2 per cent. In effect, it would have to turn out-- there would be a break-even point only when about two-thirds-- yes, exactly two-thirds of the programs used ASCAP music.

1B PM

THE COURT: Where does the 3 per cent figure come from?

MR. HRUSKA: This is what I assume in my question, your Honor.

THE COURT: Rather than 4-1/2?

MR. HRUSKA: No, rather than the one per cent.

THE COURT: All right, I thought you said two instead of three per cent. I see. All right. I understand.

A If direct dealing resulted on the average in 3 per cent, then if CTN had only two-thirds of its programs using ASCAP music and it successfully dealt for every piece of ASCAP music, then it would be paying three per cent on two-thirds of the programs intead of two per cent on all of them, evn then there would be a break-even point but only then.

Q Assuming that the per-program rate was as low as 4-1/2 per cent, would it be rational, in your opinion, for the CBS Television Network to take a per-program license?

A I don't think so, because as I think these computations show, even if they assume that they were going to be able to deal for a lot of music at a much lower rate --

I am sorry, even if they assumed the music they could deal for they could get at a much lower rate, they would have to assume that they could deal for almost all of that music or large chunks of that music before it would pay.

Q You don't believe that the assumption that direct licensing rates would be lower than previaling blanket rates is realistic?

A No, I think that the direct licensing rates would be pretty close to the per-program rates which I testified would in the nature of it have to be higher than the blanket rate.

Q Returning briefly to the subject we discussed this morning, namely, the hypothetical bypass by the CBS television network of ASCAP and BMI, in your opinion would it be rational for ASCAP members not to want to deal directly with the CBS television network or packagers of CTN programs in such a bypass situation?

A Yes, I think ASCAP and BMI members are in a situation in which they are not exposed to price competition. I think most people would rather remain -- rational people would rather remain in that position rather than expose themselves to the uncertainty of the competition.

Q Would your opinion in that regard be the same absent the fact that came to your attention with respect

to the 3M incident?

A Well, I think the facts from the 3M incident certainly support that view. Yes, I think a general view would have to be that people who are organized in a system which insulates them from price competition would be rather reluctant, and properly, in the sense of their making a proper calculation of self-interest, properly reluctant to deal with somebody who is explicitly trying to attempt to break down that system.

Q Do you have some familiarity with the rate making procedures set forth in the ASCAP consent decree?

A Yes, I do.

THE COURT: How was that derived, from study of the decree?

THE WITNESS: Yes.

Q In your opinion, does that decree or do those procedures provide the economic equivalent of a competitive system?

A No, they don't.

Q Or fees set in a competitive market place?

THE COURT: Or what?

Q Or fees set in a competitive market place.

MR. TOPKIS: Which is it?

THE COURT: I guess he is asking two questions.

MR. HRUSKA: I guess I am, your Honor. Perhaps I should break it down.

Q Do those procedures or does that decree provide the economic equivalent of a competitive system?

A No.

Q Why not?

A Well, I think there are two aspects to discuss. One is whether, given the overall rate which might be set by the consent decree Judge, whether if that were set so as to mirror the total amount of payments for music that would be made in a competitive system, then we would have in some sense the equivalent of a competitive system.

The other question is whether it is reasonable to suppose the consent decree Judge can in fact set such a rate. I think the answer to both questions is no, and let me say why.

First suppose that the total amount that CTN and other networks were to pay to the performing rights society was somehow fixed at the same figure that would emerge from the total of all competitive market transactions, that would still be a blanket license, and a blanket license is still inherently distortive of incentives toward the efficient allocation of resources. It would still be the

case the way I mentioned this morning that packagers would be unable to trade off music against other inputs and save money thereby.

It would still be the case that the prices paid for music would be divorced from their use; and so on.

Secondly, I don't believe that it is possible for anybody, however wise, to come up with a number that is the total amount or even close to the total amount of money that would be paid by the networks under a competitive system.

A competitive system has never existed in the performance rights industry. There is really no history to go on.

In a competitive market, the machinery for negotiation, the ways in which the transactions take place, would be different from machinery now in existence. There would be different transactions for different kinds of music, different transactions for the same kind of music in different uses, different transactions for different songs of the same type depending upon their relative values to users, relative values to copyright holders and so forth.

There are a fantastic number of those transactions and I don't see how it is possible for anybody to predict what the outcome of those transactions is likely to be.

THE COURT: Are you saying, among other things, because I know it is not the only thing you are saying, that if there had been a study made of the industry which provided information with regard to amounts paid and if there had been a history of competition which provided a factual basis for such a study, then a Judge or anyone else asked to accomplish what Judge Ryan has been asked to do might, I use the word "might" advisedly, be able to set a fee which would be the economic equivalent of a competitive thing but without the present conditions in your opinion, it cannot be done by anyone.

THE WITNESS: As regards the setting of the total fee, I think that is right.

Q Do you believe that a Judge called upon to set per use rights under the per-use system that we discussed could do that on a rational basis?

A Yes, I do.

Q Why?

A I think that is altogether different and it is different for at least two reasons -- in the first place, as I testified this morning, there is a sense in which the rates set under a per-use system are self-correcting.

If they are too high, they will be bargaining under the rates.

If they are too low, people will withdraw from the system and will be bargaining outside the rates.

I think the only thing that has to be kept in mind is the fact that the rates will apply to no-notice use of music, the music in the can, and they have to be ... high enough to give a reasonable return for that.

But beyond that, it is not, I think, a crucial problem because the object is to set a system which creates a machinery for competitive market to take over.

Moreover --

THE COURT: Can I get in there a minute? Are you really saying that the Judge, at least the first year round -- it might be a little different as things went on, of course -- would be able to do a better job on this new system, per-use system, or merely that there would be less damage done if he didn't make the right decision because things would correct themselves?

THE WITNESS: Well, I think I am say ing the latter, your Honor, as regards to the first time around --

THE COURT: Thereafter, I can understand that the Judge or anybody would be guided by what actually had occurred in the market place?

THE WITNESS: That's right. There would be an immediate amount of experience accumulating for him to

go on.

THE COURT: Thank you.

Q As an economist, Dr. Fisher, in your opinion would the ability or likelihood of the parties negotiating per-use rates be affected materially by the fact that the Court was standing by ready to set those rates, if the parties could not agree?

A I think that would assist the parties in reaching a bargain and, yes.

Q Why is that?

A Well, I think that both sides would know that a bargain of some sort is going to be reached, either at a rate they agree upon themselves or at rates that are going to be set if they can't agree. Neither side is going to be able to force the other back into the situation of no agreement.

I think given that, both parties are likely to feel that they are better able to protect their own interests and the interests of their members in the case of the performing rights societies by doing the negotiations themselves and using their expertise in the music field than they will be in a litigated proceeding.

THE COURT: I don't know whether this is really within your area of competence or not, although you

have just ventured an opinion on it, that a distinction might be made there between -- we are not talking about a Judge fixing any private negotiation, are we?

MR. HRUSKA: No, your Honor. The question wasn't meant to imply that.

THE COURT: I want to raise for your consideration the question of whether there isn't another way of looking at this as a result of experience in collective bargaining of unions and so on, which it seems to me a Court can take some judicial notice of, as having perhaps the opposite effect, that as more and more devices are made available for outsiders to make these decisions, somebody having a collective responsibility, such as a union leader, in which I wouldn't say the dynamics are necessarily the same for ASCAP, will leave it up to the outsider so he doesn't have to assume the responsibility.

I don t know whether you considered that aspect of it or whether you necessarily think it is relevant here, but it occurs to me.

THE WITNESS: Well, I think there is something in it. I think -- put it this way. I think if the parties were in some sense symmetrically placed as they are perhaps in collective bargaining, which I don't know very much about, that would be a larger factor than it is here.

I think here perhaps the overriding consideration is the question of whether by failing to reach an agreeme nt, the performing rights societies can or cannot force CTN back to a blanket license.

Q What had your prior answer assumed on that point?

A Well, I think my prior answer incorporated the view that said that the agreement would be more likely if it was evidence to both parties that that could not happen.

Q I would like for you to consider the following proposition -- that while the CBS television network holds an ASCAP blanket license, it engaged upon a program of attempting to directly license music from copyright proprietors for CTN programs and after having done that for some substantial period of time it makes an application under the ASCAP consent decree fo. a new blanket license, asking for a lower rate by virtue of the direct licensing that it has engaged in during this interim period.

The question I would like to put to you, Dr. Fisher is, again, of course, as an economist, would you regard a decision by CTN to embark upon such a project as a rational decision?

A Well, of course, I can't possibly predict what Judge Ryan might or might not do when faced with such an application, and I suppose in a way that is the point.

I don't think CTN could possibly predict what Judge Ryan would do when faced with such an application either and that would make the situation a little risky.

It seems to me that,not presuming to put myself inside Judge Ryan's thought processes, but putting myself in CTN thought processes, thinking about Judge Ryan's thought processes -- I don't know whether it is easier or harder but it is different -- it seems to me if I were thinking about what Judge Ryan would do, I would think that he would be very attracted by the notion that the fee for the blanket license ought to be reduced by the amount that has been paid in direct licensing.

If that is how it came out, CTN would have ended up paying the same amount as if they had paid for the blanket license in the first place, and they would, of course, run the risk that it would be more after a reasonable amount of litigation. It doesn't seem to me that that is a terribly attractive or rational prospect for CTN to want to get into.

THE COURT: In other words, in this case, it wouldn't be a question of nothing ventured, nothing gained, but something ventured and perhaps nothing gained?

THE WITNESS: Possibly something lost.

Q Do you foresee a competitive market being established by that process?

A You mean assuming CTN decided to go ahead and do it?

Q Yes.

A I don't really know how that would end up but I guess the trouble is that I don't think CTN can know how that is going to end up either. It seems to me an around-about way to go about engaging in this venture.

THE COURT: Isn't the major economic factor there the uncertainty of knowing the outcome?

THE WITNESS: That's right.

If the price doesn't change, they have ended up paying twice for the music.

THE COURT: And you don't conceive the price changing down to a point where they are going to have to pay less?

THE WITNESS: If I had to predict-- if I were CTN trying to predict what Judge Ryan would do, I think that is the obvious place to predict.

MR. TOPKIS: Your Honor, can this be anything other than guessing games?

THE COURT: I don't think the Professor intends it as much more than that, a guess, on this subject.

On the other hand, it is necessary for CTN to do what it can to put views before me since it has been suggested by the defendants that they pursue this route.

Q Could you define a monopoly for us?

A A monopoly is a firm which has power to keep the prices up and what necessarily goes with that power, to exclude competitors from its market.

Q What do you mean by the term "market"?

A Well, economists like to talk in something like the abstract about the market for homogeneous good, in which there is a bunch of suppliers supplying that good and a bunch of buyers buying the good and there are not very many close substitutes and it is all very easy to describe.

In most cases, in real life, it turns out to be the case that there is a collection of heterogenous goods and a chain of substitutes and it is hard to draw the line as to where market boundaries come.

Typically, two goods ought to be included inside the same market. If either customers can readily turn from one to another so that by using them, as it were, interchangeably, customers can avoid a price rise on the part of one good by going to the other, or in economics, if the technology of manufacture of the goods is so close that an

attempt on the part of one group of producers to raise the price would cause the other group to change what it is doing, produce the same good as the first one, that would be an interchangeability in terms of supply.

Necessarily, in most real life situations, these are matters of degree.

Q In your opinion, do ASCAP and BMI operate in the same market under the present system?

MR. TOPKIS: Operate in the same market?

I have no objection to that question. I'm sorry; it is not the one I expected.

THE COURT: All right.

Can you answer?

A Well, the present system is kind of peculiar, it seems to me, in that respect. Individual pieces of music are, to a greater or lesser degree, interchangeable. Talking now about performance rights, packagers have some choice in changing what they do, going from one individual piece of music to another individual piece of music, and if the songs were priced individually, there would be a sense in which a great deal of different music would be in the same market and quite possibly ASCAP and BMI music would be in the same market.

But the thing about the blanket license system

is that the commodities which are dealt in are not individual songs. They are individual blanket licenses and even tough ASCAP music may be in some respects a substitute for BMI music, the ASCAP blanket license is not a substitute for the BMI blanket license.

It is not possible for a customer, if ASCAP raises its price, to say, okay, I won't take your version of this commodity, ASCAP; I will go to BMI with a lower price and use a BMI license instead.

Television networks have to use both and in that sense they are not substitutes and I would say that by choosing to do business in, or converting the world into a world in which the commodities are blanket licenses, ASCAP and BMI have converted it into a world in which they are each essentially dealing in a separate market.

Q In your opinion, then, is ASCAP and BMI each a monopolist?

MR. TOPKIS: Objection, your Honor.

THE COURT: Because he has asked for an opinion on an ultimate question? Is that it?

MR. TOPKIS: That is one reason.

I think the answer will go echoing down through the corridors of time far more than it would have utility to your Honor but more than that, it is kind of a tail-

chasing bit.

He is being asked for facts here or opinions but when he says that they operate in two different markets, to ask him then, to that degree, he has given something useful to your Honor. Beyond that, I simply think not.

THE COURT: I'll sustain the objection.

I think on the basis of my view that Dr. Fisher has by what he has testified to up to this time, given me enough information and opinion so that I can answer that qustion and it is I who will have to.

I don't think he has given me many choices but--

MR. TOPKIS: We may have skipped a headline in Variety; that is perhaps the most important.

Q There is some economic hypothesis, I think I read somewhere, Dr. Fisher, about each company in a sense being considered a monopolist of its own product.

Do you know what I am referring to? Have you ever heard that doctrine?

A Well, there is a trivial sense in which every manufacturer of something with his particular brand name on it is the only seller of that particular something with his brand name on it.

That is not a terribly meaningful sense if there are other manufacturers selling substitute products

with other brand names on them.

Q Is there a distinction in your mind between that sort of market position, as it were, and the one you previously ascribed to ASCAP and BMI?

A Yes, there is.

MR. TOPKIS: I think it is self-evident, your Honor.

Do you need anything more on that?

THE COURT: Not for me.

I am aware that you are not saying that the only reason they need ASCAP music is because it is called ASCAP music.

THE WITNESS: Yes. It is much more substantial.

THE COURT: It is an actual demand for the kind of music in ASCAP's inventory and an actual demand for the kind of music in BMI and neither one would be sufficient alone for the TV networks.

Q In your opinion, Dr. Fisher, do ASCAP and BMI have power over the price?

MR. TOPKIS: Objection, your Honor.

THE COURT: No. I'll allow an answer to that question. Of course, I know what the legal aspect of it is but we are talking economics now.

MR. HRUSKA: Exactly.

MR. TOPKIS: I don't even think we are talking economics, when a man is testifying not about anything with which he has had the slightest experience, but about something where he has read some testimony in this case, some of which hasn't even undergone cross-examination.

THE COURT: Well, I understand that indicates very serious limitations to be placed on the opinion but I think the opinion has some value within those limitations.

Furthermore, you are perfectly free, of course, to cross-examine on it.

I'll hear it.

Q When you state your opinion, Dr. Fisher, could you state the basis for it?

MR. TOPKIS: Could we have ASCAP and BMI at least separated?

THE COURT: Yes.

A Well, but I think the essential part of the answer goes to the fact that in fact they are separated, that ASCAP, if it raises its price for the blanket license now, ASCAP if it raises its price for the blanket license, does not run any substantial risk of having the television networks go to BMI.

BMI, if it raises its blanket license, does not stand any substantial risk of having television networks go to ASCAP as a substitute.

That's what there is to say about that.

Q In your opinion, does the ASCAP consent decree operate to remove ASCAP's power over price?

A Not materially.

Q Why is that?

A Well, as I testified before, I don't think the consent decree judge can possibly know what the price, the overall price would be that would be paid for music in a competitive market. Even then, all he has to go on is the experience of the past.

I think it is true that if ASCAP were suddenly to double their price or triple their price, it would be possible for the judge to say "No, that is unreasonable, that can't be what a competitive market would do" but barring that, so long as ASCAP is somewhat circumspect about

the speed at which it keeps raising its fee, I don't think the judge can have much basis to go on, other than that, to limit ASCAP's ability to set the price as high as the market will bear.

Q I believe you testified earlier that you had some familiarity with the ASCAP distribution formulae as a result of reading the materials annexed to the stipulation.

Are you aware of the fact that performances on each of the television networks generate a certain number of ASCAP credits for the members of ASCAP who have rights to the music which is performed?

A Yes, I am.

Q Assume that the payments made by each television network per each credit generated on the network during the course of the year differs among the networks; that is, each network pays a different amount of money per credit.

THE COURT: By virtue of paying a different license fee?

MR. HRUSKA: That is right, and by virtue of there being a differing number of credits.

In other words, we divide the number of credits into dollars.

THE COURT: All right.

Q. What would that imply to you as an economist with respect to ASCAP's power over price?

MR. TOPKIS: Is it suggested that there is any predicate whatsoever in the record for that question?

THE COURT: I don't know that there is anything in the record except that I believe that somewhere in this record there msut be information about the fees paid by the networks.

I don't know about the credits.

MR. HRUSKA: Yes, and that is in the answers to interrogatories, and also the number of ASCAP credits attributable each year to the various television networks is also in the answers to interrogatories.

MR. TOPKIS: Yes, and what is omitted is what is paid per performance on a network.

MR. HRUSKA: That I think we could calculate.

MR. TOPKIS: No, that is the whole point, you can't.

MR. HRUSKA: That is an argument of counsel, your Honor.

MR.TOPKIS: No, it is not an argument of counsel.

THE COURT: I don't think that Mr. Hruska is required to include that factor in asking this question,

if he could argue to me later that the omission of that factor is not damaging.

How is it damaging?

MR. TOPKIS: It is not the omission of a factor. It is the insertion in the queston of a statement contrary to undisputable fact.

THE COURT: Then I don't understand it.

Will you explain?

MR. TOPKIS: I will do my best, your Honor.

As I understand it a performance on NBC, CBS, or ABC is worth the same.

MR. HRUSKA: To whom?

MR. TOPKIS: To the copyright proprietor.

MR. HRUSKA: That is not my question, your Honor.

THE COURT: I didn't think it was his question, Mr. Topkis. I understood Mr. Hruska to ask a question which may lead nowhere but a different question; that is, that bearing in mind that each of the television networks pays something different from the other for a blanket license, and that in addition, they run up a different amount of credits --

MR. HRUSKA: Numerical credits.

THE COURT: -- numerical credits from each other,

does that, the combination of those two factors or each of them singly suggest to Dr. Fisher anything of economic significance relating to ASCAP's power to fix prices?

MR. TOPKIS: If I misunderstood,your Honor, I apologize.

THE COURT: You didn't misunderstand me. At any rate, that is the question and I don't know whether it is going to produce anything but it seems to be based on facts that exist.

MR. TOPKIS: To that degree, it is.

A Well, I'm sorry, your Honor, but it seems to me that Mr. Hruska asked me one more thing, and I have to know the answer to that.

THE COURT: What one more thing did he ask you?

THE WITNESS: I think what he asked me to assume was that if you took the payments which each of the networks made, and divided it by the number of credits which each of the networks generated, that those ratios would not be the same.

THE COURT: We-l, all right, that is a mathematical application of the two previous factors, is it not?

MR. HRUSKA: That would almost invariably follow, your Honor, from the way your Honor put the question.

I think there is one posit out of infinitum of possibilities where it would not follow.

I think that is what Dr. Fisher means.

A Well, assuming that to be the fact, then it would seem to me that in some reasonable sense, ASCAP has power over price not merely in the sense of the level of the price which it can charge but in the fact that it can charge different prices for what are essentially the same things to different customers. That is not a usual circumstance.

Q Does ASCAP have the power to exclude competitors from its market?

MR. TOPKIS: May we know what an ASCAP competitor might be since we have been told previously that there is nobody but ASCAP in a market?

MR. HRUSKA: I would be happy to have an answer.

THE COURT: I suppose we should put in the adjective "potential competitor."

MR. HRUSKA: Right. Thank you, your Honor.

I will repeat the question.

THE COURT: Yes.

MR. TOPKIS: Could we even have some identification, your Honor? It seems to me this is playing

games.

Is there a competitor, a potential competitor of ASCAP that we are talking about?

THE COURT: Certainly it is not an usual question to ask or an unusual factor in the determination either economically or legally of the power tokeep a competitor out of your market.

Now, obviously that competitor is never there at that time. There may be certain special characteristics, and indeed I am certainly brainwashed enough by now to believe lthat there are special characteristics to the music industry, to suggest that there never could be a competitor. but I am willing to hear what Dr. Fisher has to say, and to leave it to you to clarify any ambiguities that may exist if he does not answer to your satisfaction.

Now, can we get back to the question, please?

THE WITNESS: Could I have it read, your Honor?

THE COURT: I would like to have it read.

MR. HRUSKA: It might be faster if I restate it, your Honor, because I want to add the word potential.

MISS KEARSE: May I add one thing, your Honor? It seems to me the professor has defined the market in such a way that there cannot possibly be another competitor.

THE COURT: I think what Mr. Topkis and you are doing are bringing out inconsistencies or possible inconsistencies in the Professor's testimony and you are going to have a grand time cross-examining him and see if you are right, but let's hear what he has to say.

Q Does ASCAP have the power to exclude any possible potential competitors from its market?

THE COURT: In your opinion, obviously.

Q In your opinion.

A Yes, I think it does.

Q Why?

A Well, I don't think it is just a matter of definition; although I think I stated as a matter of economic analysis that a different performing rights society with a different pool of music from ASCAP is not, so long as we are dealing in terms of blanket licenses, is not in the same market as ASCAP; but there is a different posit which is that another performing rights society might form and take away ASCAP's membership and offer -- potentially offer a substitute for the ASCAP blanket license in that form.

I don't think that that can happen.

One of the reasons it can't happen is the following:

In most situations, a firm's power over price is

limited in the sense that the more it exploits its customers, the more it makes it attractive for new entrants to come in and take away the business.

In this circumstance, the better ASCAP is at exploiting its power over price, the happier its members are going to be to stay with it because that is where the money is going to go.

That will make it the more difficult for a new society to form, and provide this new kind of competition.

In addition, some aspects of the ASCAP distribution system make it difficult or at least impede the formation of a different society.

Let me come back to that.

I believe it is also the case -- no, I am not sure about that. Let's go back to the distribution system.

Part of the Four Fund distribution system which ASCAP has, sets up a system in which members are paid in terms of their --rewarded for continuity of membership in ASCAP. That means that an ASCAP member, thinking of leaving ASCAP, to join some potential new society that might otherwise want toform, is going to have to bear in mind the fact that if the society fails, the new one, and he comes back to ASCAP, he is going to lose a certain amount of money.

THE COURT: Like losing seniority.

THE WITNESS: That's right.

A Secondly it is the case that the averaging part of the four-fund system, because it gives credits based upon past performances, essentially gives higher weight to composers who have been relatively popular in the past and are less popular now than would be true on a current performance basis.

Since the pie which is divided up in the ASCAP distribution system is a pie consisting of payments made in the current year, that means that in each year writers popular in that year are subsidizing writers who have been popular in previous years but whose popularity has declined.

Of course they do this because they in turn in part will be subsidized later on and because they want to smooth out their income for tax purposes.

But the result of this is that if a new society is to form and succeed and provide a substitute for the blanket liecense, it is going to have to attract established writers who own the copyrights on standard music.

In order to do that, it is going to have to subsidize them as they are in the ASCAP system; and they are going to have to do that, they are going to have

to do that, they are going to have to attract new writers and set up with a miniature four-fund system.

That is going to prevent the new society from forming, I think, on a small scale. The distribution system is complicated enough that in order to duplicate the payments which somebody would get out of staying with ASCAP, and indeed to compensate him for the uncertainty with which he must look at the joining of a new society, the new society would have to be fairly large, and economies of scale are a standard barrier to entry.

The new society won't be able to enter by going with individual copyright owners and gradually grow. It would have to get quite a lot of them all at once.

Q You mentioned the fact that the more effectively ASCAP exploited its market power, the greater its attractiveness to its members. Would the same thing be true of BMI?

A Yes, certainly.

Q Does BMI in your opinion have the power to exclude competitors from its market?

A Yes, I believe it does, and I don't want to get inot the question unless you particularly want me to talk about it. I don't want to particularly get into the question of whether BMI members now have the right to deal outside of BMI.

It is my understanding, which I may be incorrect, that unlike ASCAP members they don't.

But apart from that --

MISS KEARSE: Your Honor, I believe that we have a stipulation in this action which governs that point, which is that the practicability of dealing directly with BMI affiliates is to be determined by your Honor's determination as to the practicability of dealing directly with ASCAP.

MR. HRUSKA: We indeed have that stipulation, your Honor, but I would present the view that that stipulation does not bear on the legal question as to whether BMI members under the BMI affiliation agreement have the legal right to deal directly.

THE COURT: As you respectively describe what you are talking about, I believe I am inclined to agree with Mr. Hruska. I think he is talking about the same thing Miss Kearse is talking about, but it doesn't seem necessary for either me or Dr. Fisher to worry about this if by definition what he is about to say is not conditioned on the assumption that BMI members either do or don't have the right to withdraw.

Is that right? I mean to license separately.

A I think there is that issue, but I am really

not going to discuss that.

THE COURT: It is nota question of discussing. Are you assuming it one way or the other?

THE WITNESS: No.

THE COURT: Is it a factor in your --

THE WITNESS: In what I am about to say I am going to exclude that.

THE COURT: All right.

A It seems that the system is much the same as regards ASCAP with the exception that I don't know anything about the BMI distribution system. That is that the more BMI is, as it were, efficient at pushing up its price and exploiting its market position, the happier its members are going to be and the less easy it is going to be for a potential new society to form out of a large sub-set of BMI members.

I also think it is true, but this of course must be a matter of record, that -- yes, I think it is true -- at least ASCAP and I believe BMI have provisions that say that you can't be a member while they -- while they may be able to deal directly, your members or affiliates cannot also be members of another performing rights society and license part of their work through such a society.

So this is an all or nothing thing as to which

society a man belongs to.

That also prevents another society from forming with thesame membership.

THE COURT: Let me ask you this. You talked about the fact that ASCAP or BMI, as the case may be, or any organization like that, will obviously retain their membership more effectively the more they drive prices up.

Wouldn't it be equally true that a new organization would more readily detach members from ASCAP or BMI if somehow it could dr ive prices up? Now I understand that if, and it is a big "if," and I would like to ask if you have given it any thought as to whether that is a possibility.

THE WITNESS: The point I was making, your Honor, is that in most situations over-exploitation of market power is what induces entry, and in this instance -- so that entry must -- the possibility of entry has to leave in the mind the possibility that "I better not go too far in the direction I'd like to go or I will produce competition."

THE COURT: You do know that BMI was born -- or sired rather is the better way to put it -- by the networks themselves?

THE WITNESS: I am aware of that.

MR. HRUSKA: By the broadcasters, your Honor.

THE COURT: By broadcasters. I understand, maybe s am wrong, as the result of their desperation at the time vis-a-vis ASCAP. Is that a statement which will be accepted or not?

MR. TOPKIS: Desperation?

THE COURT: Dissatisfaction.

I wonder whether that fact you consider to be significant in any way?

THE WITNESS: Well, yes, I think it indicates that at least in that environment there were some limits beyond which something was going to happen. I do think that is a whole different environment, long before television or, it is well before television, and I didn't mean to suggest that infinity was the only limit on the price.

THE COURT: No, I didn't think you did. All right, thank you.

MR. HRUSKA: Could I request that we take a recess now? I am really right at the end. I just want to consult with my colleagues.

THE COURT: All right.

(Recess.)

MR. HRUSKA: Your Honor, I have no further questions of Dr. Fisher.

CROSS-EXAMINATION

BY MR. TOPKIS:

Q Dr. Fisher, Professor Fisher, if I may, you said, sir, that in preparation for your testimony here you had read certain material.

Could you tick off for me, please, exactly what it is that you have read?

A Yes. I'll have to look it up I am afraid. I have a list.

Q Would you consult that, please?

I have been sitting here wondering what the two books were and now I'll find out.

A Well, actually, if you ask the questions in the right order, this is the first thing in the book.

I have read the following depositions: Stanley Adams, Allan Arrow, Albert Berman, Leon Brettler, Sammy Cahn, Salvatore Chiantia, Cy Coleman, Paul Fagan, Herman Finkelstein, Eugene Goodman, Burton Lane, Paul Marks, Marion Mingle, Edwin H. Morris, Jerry Vogel, Ted Washington, and this list gives a couple of more, namely, Al Bractman and Sidney Herman and I believe I've read those, but I don't at the moment recall whether I

have.

I've read the testimony up through yesterday morning and I have read the stipulations.

Q Including the exhibits annexted thereto?

A It's a long time now. I have certainly read the pamphlet describing the distribution system. You will have to refresh myrecollection as to what the other exhibits were.

Q Well, I take it at some point you read the amended final judgment.

A Yes.

Q And what else have you read, sir?

A Well, I read a lot of the arguments in connection with the motion for summary judgment on both sides.

Q On both sides?

A Oh, yes.

Q And you have read the briefs?

A I have read both briefs.

Q How about the trial memoranda and reply memoranda submitted to his Honor?

A I am sorry. I may be confused. I believe I read the trial memoranda. I am not sure I read the briefs.

Q Have you read anythng else?

A Not that comes to mind.

Q And you have read the entire trial transcript up through yesterday, was that what you said?

A Yesterday morning. I read it. I must say that I was rather rushed to read yesterday morning, so I only skimmed yesterday morning. I looked at it. I read the rest of it up to -- today is Wednesday -- up through Monday afternoon, I have read with more care.

Q No apologies needed. We all know that you have been doing more or less double duty in the recent past.

Have you read anything else or does that exhaust your reading in preparation for your testimony?

A I think that is all, sir.

Q Have you talked with any songwriters about your testimony or about the subject of performance rights licensing?

A No, I haven't.

Q Have you talked with music publishers on those subjects?

A No, I haven't.

Q Have you talked with any packagers of programs?

A No, I haven't.

Q Have you talked with Judge Ryan?

A No.

Q You said something or antoher about a time when Warner Brothers withdrew from ASCAP and certain conclusions that you drew from that fact.

May I ask you, Professor Fisher, were you alive when Warner Brothers withdrew from ASCAP?

A Yes, I was.

Q That forces me to ask your birthday.

A I was afraid that we were going to get to that.

I was born on December 13, 1934.

Q I think you were wrong then as to your prior answer.

A In that case --

THE COURT: Do you want to know the source of his information on that subject?

MR. TOP KIS: No. I always understood that was one subject on which hearsay evidence from one's mother was entirely incompetent.

THE COURT: I didn't mean about his birth but I meant his knowledge of the Warner Brothers situation.

I don't know if that is part of the record in this hearing or not.

MR. TOPKIS: There is some reference to it in one of the depositions that Proffessor Fisher read, your Honor, and we will be developing the story as we go along.

Q You testified, I think, Professor Fisher, that you would expect that there would be some kind of tendancy on the part of ASCAP members as economic recourse to have a reluctance to deal with CTN or packagers directly.

A If CTN were to attempt to bypass ASCAP.

Q Right. Have you ever heard of an enterprise called April Music?

A Yes.

Q And you have heard of an enterprise called Blackwood Music?

A Yes. In the same context.

Q You are aware that April is a member of ASCAP and Blackwood is an affiliat of BMI?

A Yes.

Q Would you expect them as rational economic creatures to behave in the same way?

A Well, I recognize, of course, that April and Blackwood are public companies which are subsidiaries of CBS. I am not sufficiently familiar with the

ins and outs of the CBS organization to know to what extent those are arm's length dealings.

Q Those are what, sir?

A Arm's length dealings but I gather that Mr. Dean, the president of one of the companies, will be called as a witness and you might ask him.

Q If you will come back, you will hear us do so.

You are aware, are you, Professor Fisher, that there is a certain competition between ASCAP and BMI for members and affiliates?

A I am generally aware of that.

Q And you are aware that writers move from ASCAP to BMI and happily on occasion vice versa?

A Well, not being associated with either organization, I couldn't necessarily subscribe to the happily, but I'm aware of the fact.

THE COURT: I think he meant ASCAP was happy, not necessarily the person moving was happy.

Q Relieved might be another term.

Did I understand you to say, Professor Fisher, that the rational businessman wouldprefer to avoid price competition?

A I think a rational businessman in a circum-

stance in which he is not exposed to price competition because by agreement or parallel action or what have you, he and his potential competitors are charging the same price, would probably prefer that situation to the situation in which he had to get out and struggle on a price basis, yes.

Q You wouldn't draw from what you have just said the inference that rational businessmen tend to agree on prices, would you?

A Well, I believe there is a passage in Adam Smith's The Wealth of Nations which expresses this in more pungent language than I would use, but I cannot forbear quoting it toyou. It's a standard quote among economists and it goes:

"Men of the same trade seldom meet together, be it even for marriment or diversion but the meeting ends in some conspiracy to raise prices or otherwise cheat the consumer."

Now, that is rather stronger than I would subscribe to but, yes, I think there is a natural tendancy in that direction.

Q You have been a consultant to the National Association of Broadcasters?

A Yes.

Q Have you ever attended any oftheir meeitngs?

A No.

Q Perhaps it's fortunate.

Do you know anything about the BMI distribution system, Professor Fisher?

A No, I don't.

Q And I take it you don't know how many members each year have moved from ASCAP to BMI and vice versa, in, say, the last ten years?

A No.

Q Professor Fisher, would you agree with me that there are certain goods and services which are sold or offered for sale in our society in very significant degree without regard to price?

A Well, yes, I think there certainly are some such situations.

Q We could quickly agree, could we not, for example, that not too many poets are in bitter price competition with each other.

A We could.

Q And the same would be true of sculptors?

A As far as I know.

Q Painters?

A Yes.

Q Generally, people in the arts, novelists, playwrights?

A Basically, that is right so far as I know.

THE COURT: Are you distinguishing between the creator being consciously in competition with another person as to price as distinct from the work which he achieves, are you? or are you not?

MR. TOPKIS: I am not drawing that distinction, your Honor.

THE COURT: You mean you are asking the witness whether he agrees that one painting does not compete with another painting for price?

MR. TOPKIS: Poems, works of sculpture, plays, novels.

A I would like to distinguish between some of those although I think in general I would agree that that does

not happen; that by and large, one painting, let's say, is sufficiently different from another painting that close price comparisons don't get made.

On the other hand, I think it is certainly also true that some attention is paid to the price of paintings in their purchase.

Q No doubt about it.

And as to plays, when they are offered for performance on Broadway, we could agree, I would suppose, that there isn't much price competition among playwrights to sell their plays to producers but, on the other hand, after a play has been successful, possibly, there will be competition as between plays for movie rights sales; that kind of thing?

A There might be, and a successful play-- I don't know to what extent-- I don't know enough about the market for the services of playwrights to know to what extant there are differing prices on it or to what extent film-makers and producers shop around on the basis of price.

Q Then I'll not press the point.

How long ago were you retained in connection with this action, Professor Fisher?

A I was asked to start work on this action in --

I have forgotten whether it was July or August of last year, but I suppose that is close enough.

Q Could you tell us about what portion of your time since then you have devoted to this subject?

A Well, I would think roughly a day a week on the average.

Q Professor Fisher, was it your choice or the coice of someone else that determined that you read the depositions or a number of depositions which had been taken by CBS in this case, but read no depositions which had been taken by our side of CBS personnel?

A Well--

THE COURT: The question is, who decided what depositions he was going to read?

MR. TOPKIS: Yes.

A I must apologize, Mr. Topkis.

I should not rely on the books in front of me. It occurs to me that the list I read you before is not complete and this list presumably refers, as it says it does at the top of it, to depositions, extracts from which are in the books .

I have in fac read Mr. Sipes' deposition, Mr. Stanton's deposition among others.

I don't believe I have read Mr. Poklitar's

deposition and if you will remind me whose depositions you took, I'll tell you whether I read them.

Q Mr. Jenks, Mr. Wood, Mr. Dean?

A I read both the Dean and the Jenks depositions.

Q Not wood?

A I am not sure.

THE COURT: You haven't yet answered the question that I am interested in, too.

How was it decided which depositions you would read?

THE WITNESS: Well, all the depositions were made available to me and either it was obvious to me that I ought to read them or one of my assistants went through them and told me more or less what was in them and I made a decision as to whether it was necessary to read them.

THE COURT: So essentially you made the decision?

THE WITNESS: I made the decision.

MR. TOPKIS: I have no further questions.

Thank you, Professor.

CROSS-EXAMINATION

BY MISS KEARSE:

Q Professor, you said that you had the documents which were attached to the stipulation between CBS and

Did you read all of the documents that were mentioned in that sipulation?

A Well, it is a long time ago now, Miss Kearse, and I can't recall.

If you would ask me about the documents, I could tell you whether I have seen them, I hope.

Q Suppose I show you the document which has been marked PX 203 for identification, which is the stipulation, which lists various documents in it.

Could you tell me if you had read the documents?

A I'll try.

MR. HRUSKA: I wonder, your Honor, if the documents themselves, the exhibits to the stipulation, couldn't be made available to the Professor?

THE COURT: Put them on the rail there just in case he wants them.

A Well, I think the thing which would be most efficient for me to do would be to go through this paragraph-by-paragraph and tell you what I think. There may be occasions on which I am not sure and then it would be better to look at the book.

I believe I read Paragraph 4, I think, the first one. I'm sorry. No.

The standard forms of affiliation agreement between television stations and CTN that are mentioned in Paragraph 2. I believe I have seen those.

Standard forms of ASCAP Pbulisher and Writer Membership agreements and the Writer and Publisher applications for membership are annexed hereto, I have seen those.

The standard forms of membership and television agreements for the period preceding those two exhibits are the nextones and I believe I have seen those although I can't say I lingered over them.

Numbers of ASCAP writer and publisher members at the close of each of the years 1960 through 1969, I have seen.

I have at least thumbed through the agreements with the foreign perforance rights licensing societies.

Forms of agreements between ASCAP and those societies I have looked at.

The ASCAP Articles of Association I don't recall.

The amended final judgment I believe I looked at. In fact, I know I looked at it.

The Order of January 7, 1960, I must have looked at, if it is right after the amended final judgment.

The ASCAP Survey, its design and objective, I have read.

I looked through the financial reports of ASCAP to its members.

The standard forms of blanket and per program licenses I have looked at.

I can't say that I compared them deeply with the forms which preceded the ones currently in use although I certainly saw those forms.

I do not recall whether I looked at BMI's certificate of incorporation.

Now, Paragraph 23 says, CTN's receipts from advertisers for each of the last five years have exceeded the figures set forth in Schedule B, which is annexed to a separate stipulation and protective order.

I at the moment do not recall whether I signed that protective order and saw that stipulation.

THE COURT: I don't believe you did, unless CBS showed it to you on its own.

THE WITNESS: They may have done it. But I don't recall.

A The Schedule C, which is discussed in Item 24 and the Schedule D discussed in Paragraph 24 I may have seen.

I have certainly seen similar schedules at some time.

I don't know whether I have seen those.

I believe that is all that is listed in here.

Did I skip anything?

Q Not that I can tell.

Are those documents which are listed in the stipulation the only documents that you have examined in preparation for testifying here?

THE COURT: You mean other than the depositions?

Q Other than the depositions and the trial transcript?

A And some of the exhibits attached to the depositions.

Q Have you examined all of the deposition exhibits?

A Well, no, certainly not all of the deposition exhibits.

Q Can you tell us which ones you have examined?

A Well, my problem is I can't distinguish between deposition exhibits which are essentially read into the record of the deposition and deposition exhibits which I had to go to -- you know, the book of exhibits to look up.

On the whole, if it was not read into the record in the deposition-- if the text was not read in, I didn't read the text; although I can't say that was an invariable practice.

Q Have you read any document other than those you have mentioned as having read which was not a deposition exhibit?

A Or a trial exhibit.

Q Pardon?

A Or a trial exhibit.

Q Yes.

A My problem is, for instance, I am not sure of the current status of the letter, for instance, from Mr. Spinner on behalf of the West Coast Committee and Mr. Lane.

Q But you have read that?

A I have read that letter.

I have also read parts of the speech by Mr. Adams that I referred to earlier.

I am not sure whether that is an exhibit to a deposition or a trial exhibit, at least as yet.

Q Well, aside from those documents --

A Aside from, you know, occasional things like that, no.

MISS KEARSE: I have no further questions.

THE COURT: Mr. Hruska, any further --

MR. HRUSKA: Well, we could offer --

THE COURT: I mean, do you have any further questions?

MR. HRUSKA: No, I have no further questions of Dr. Fisher.

THE COURT: Dr. Fisher, thank you very much.

It was very interesting. I wish you a good trip back.

(Pause.)

THE COURT: I didn't mean do you have anything further today? You won't necessarily hurt my feelings if you don't because I feel a little relaxed since I thought Dr. Fisher's testimony might take two days or the

better part of two days.

MR. HRUSKA: So did I, your Honor.

We would like, I think, to offer in evidence the stipulations and read certain paragraphs of the stipulation between CBS and ASCAP and the stipulation between CBS and BMI, and a substantial part of the exhibits to the stipulation between CBS and ASCAP.

THE COURT: I assume that's been contemplated by everybody.

MR. HRUSKA: It has been, yes, your Honor.

We had planned to do this the first day, and Miss Kearse told us that she had not received the exhibits to this CBS-ASCAP stipulation of March 1972, so we sent the copies of the exhibits over and now we are prepared.

THE COURT: Will you wait just a moment while I get my copy?

I think I have a copy. Then I can follow it more readily.

MR. COLLINS: I would at this time like to offer into evidence Exhibit PX 203, which is the stipulation dated May 25, 1972, specifically Paragraphs 1 through 17 and 37 of that stipulation.

MR. TOPKIS: What stipulation is this?

MR. COLLINS: Stipulation dated May 25, 1972 between CBS and ASCAP.

THE COURT: What paragraph numbers?

MR. COLLINS: Paragraphs 1 through 17 and 37.

MR. TOPKIS: If your Honor please, as you have doubtless seen from the trial memoranda and my memoranda, there is some controversy between CBS and ourselves as to the meaning of the language employed in Paragraphs 13 to 15 of this stipulation.

THE COURT: Does that mean I should not receive the stipulation or that I have to hear argument as to what it means?

MR. TOPKIS: Well, I wrote Mr. Hruska a letter a couple of months ago saying that rather than dispute the maning of the language, I would withdraw from the stipulation.

I am content to stand by that position.

THE COURT: I am not puzzled that you disagree as to what it means but I am puzzled that it is possible to withdraw from the stipulation.

I don't know what the legal situation we find ourselves in really is.

MR. TOPKIS: I don't think it is really a matter of --

THE COURT: There must be some-- how can I put it -- I don't suppose that there was a long transcript of the discussion between you as to what these words meant at the time that they were signed, even if they were signed when you were together, which they probably were not.

MR. HRUSKA: They were actually.

THE COURT: Well, all right.

MR. HRUSKA: That is just a physical fact.

THE COURT: And I'd like to think about how to handle this. There are perhaps different ways. One is for me to accept the stipulation as something that was signed by two attorneys, and ask each of them to let me know what he intended the stipulation to convey at the time that he signed it.

Another would be to see whether, even if the ground that one of you proposes is a little broader than the ground which the other thought was being proposed, the narrower ground would be stipulated so we know what the area of agreement is.

Obviously, the office of a stipulation is to define for the Court or the jury or whatever it may be, what the area of agreement is and it does not do any good for you to say he agrees with you on something if he does not agree with you on it.

So for the moment let's keep 13 to 15 out of it and I will look at those paragraphs, of course, if I have to, and figure out what we are talking about; and we can confer on it and see how to handle those.

MR. TOPKIS: Very well, your Honor.

MR. HRUSKA: May I just make a brief statement, your Honor, on that?

It is our position that the stipulations, Paragraphs 13 through 15, should be received in evidence for what they say.

We do not --

THE COURT: Well, I don't doubt that they should be received for what they say. The question may be-- I say may be -- whether they are susceptible of more than one interpretation, and if they are susceptible of more than one interpretation and each attorney certifies to me in good faith that he, Attorney A believed that the interpretation A was correct when he signed it and Attorney B certifies that he in turn thought interpretation B was correct when he signed it, I still will have to decide myself then what the proper meaning is, won't I?

MR. HRUSKA: Yes, your Honor; I think, your Honor, under those circumstances you would have to decide the proper meaning, but I would submit, your Honor, that that

would not affect the admissibility of the stipulation itself.

THE COURT: No, I think I have expressed some doubt about whether it would before or not but at least we should in this rather confusing state of affairs think about whether there is some other practical method.

If there isn't, I am inclined to go along with that.

MR. TOPKIS: I would suggest, your Honor, that if we are going to have part of the stipulation I don't understand this business of offering some paragraphs.

THE COURT: I frankly admit I have never understood why stipulations -- maybe some day before I retire from the bench I will -- why stipulations have to be offered into evidence, except for the purpose of, if you say so, of calling certain parts of it to the Judge's attention as being something the party in question wants him to consider in deciding the case.

But it seems to me that if you never offered them throughout the trial you would still be free to refer to them when the time for argument came.

MR. HRUSKA: I think that is quite true, your Honor. My only question on that is whether it is part of the record on appeal if it is not actually introduced in evidence.

THE COURT: If you have any fears about that, I think you are entitled to put in whatever you want. If Mr. Topkis wants to put in the rest, you can put in the whole stipulation.

MR. HRUSKA: Obviously ASCAP and BMI can put in whatever part of the stipulation they want as part of their case.

MR. TOPKIS: To make it simple we put it in now, the whole thing. We are not going to start chopping it up.

THE COURT: Let me state that I will enter the entire stipulation as a Court exhibit, because I don't think there is any need to characterize it as being one person's property or another and either party is free to draw this Court's attention to any portion of it they wish to, and make any argument they wish to.

MR. HRUSKA: Very well.

MR. COLLINS: Thank you.

xxx I would also like to offer into evidence what has been marked as PX204 stipulation and order dated October 15,1971, stipulation between CBS and BMI.

MR. HRUSKA: Perhaps we could have that, your Honor, offered as another Court exhibit.

THE COURT: You want me to handle that the same way, Miss Kearse?

MR. COLLINS: That will be fine.

MISS KEARSE: I have a problem similar to Mr. Topkis', your Honor, in that it appears now that perhaps Mr. Hruska and I didn't actually agree on what we were stipulating to.

I thought we had agreed to what was here and

now I am told during the course of today's testimony that those words don't mean what they say.

THE COURT: Which point are you referring to, which paragraphs?

MISS KEARSE: The stipulation is that as to the practicability of CTN's obtaining performance licenses directly from BMI affiliates both parties will be bound by whatever their Court determines as to the practicability of CTN's obtaining direct licenses from ASCAP members.

Now, if Mr. Hruska wants to argue that that ability is more restricted with respect to BMI than with respect to ASCAP members, it seems to me that he is reneging on the stipulation.

THE COURT: I can't judge that until we get to the point where we have a specific proposition put before me. I think that the proper way to handle this, again, is for the Court to make an exhibit of the stipulation, and if the parties differ as to the meaning of the stipulation, for me to hear them and rule; and I can so do.

My introduction of the exhibit into evidence is without prejudice to your right to raise that argument as Mr. Hruska takes a position which you consider inconsistent with the meaning of the stipulation.

MISS KEARSE: Well, we have a daily day-to-day

problem on this, your Honor. If the stipulation is going to be given effect, then material as to direct licensing of ASCAP members is going to be used against us.

If not, then it is something that really has day-to-day effect.

THE COURT: If it has day-to-day effect, then I think I am a little tired to go into it now. I will be glad to meet with you 15 minutes earlier tomorrow morning and try and get a decision made and get it out of the way. Each of you present your position and let me rule.

MISS KEARSE: Agreeable to me, your Honor.

THE COURT: What kind of weapons do you want?

MISS KEARSE: Anything.

MR. HRUSKA: If I can just make a plea for tomorrow morning not to have the 15 minutes before, and I really question seriously your Honor whether this is necessary.

THE COURT: All right, ten o'clock.

May I suggest this, Mr. Hruska. Before you ask me to spend my time on deciding whether it is necessary, I think it would be a good idea for you to tell Miss Kearse the extent to which you think you may differ.

Let her voice to you her area of concern and between you people, decide whether it is sufficiently

important. If either one of you feel it is sufficiently important, I think that person has a right to ask for a ruling from the Court.

MR. HRUSKA: Yes, of course, your Honor. May I respectfully suggest also that it might be helpful for your Honor to look through this particular stipulation, which is only a page and a half, and I think it would put the matter in focus.

THE COURT: You mean the very paragraph that Miss Kearse is talking about?

MR. HRUSKA: Miss Kearse just referred to.

THE COURT: Which paragraph is it?

MR. HRUSKA: Paragraph 2.

MISS KEARSE: Is Mr. Hruska arguing this now? Is that what we are doing?

MR. HRUSKA: No, I am not arguing it now. I am simply pointing out that his Honor might find it helpful to look at Paragraph 2.

THE COURT: Well, I don't think it helps very much because until I hear everybody's position, because all I will be doing is acquaint myself with the words, I heard the words Miss Kearse read, and I got the drift of the possible difference and the objection which Miss

Kearse raised on Dr. Fisher's examination, and your answer to it.

I agreed with you that you weren't asking the same question as was framed in the words of this paragraph at the time you were asking that question, but that doesn't settle the entire issue.

MR. HRUSKA: Right. We consider ourselves bound by this stipulation, by the language of this stipulation.

THE COURT: I know, but it seems to me we are wasting more time talking about whether we should decide whether there is a difference and if so who is right, than we would be to find out whether there is a difference and decide who is right.

All right. It doesn't have to be a quarter of 10:00 tomorrow morning. If you people are working all that late and so on, we seem to have sort of gotten a little bonus on time today. Some time tomorrow an appropriate time, I will review the question with Miss Kearse and Mr. Hruska. But be prepared to do that.

MR. TOPKIS: Could we know, your Honor, who our witnesses will be tomorrow?

THE COURT: I would like to know myself.

MR. HRUSKA: Yes. I believe, your Honor, that our witnesses t-morrow will be Walter Dean, Jerry Vogel,

and Marion Preston, who is J. Walter Thompson, an advertising agency. I say I believe, because at the start of this morning I really did believe that Dr. Fisher's testimony would go at least with cross-examination a day and a half and I have got to confirm these appointments as soon as I get out of court.

THE COURT: I suggest you get somebody to the phone right away.

MR. HRUSKA: That is what I am planning to do.

MR. TOPKIS: Another thing, your Honor, we have been waiting for over a week now, I think it is two weeks in fact, for some material from Mr. Sipes, about how much of his current inventory in the can has been acquired since the commencement of this litigation, and various other subjects. We heard nothing on them. I would like to.

THE COURT: I think that we should have it by now. Of course tomorrow is the last trial day of this week, but if between now and next Wednesday this material can be furnished to Mr. Topkis, I'd like to see it. If not, not later than next week.

MR. HRUSKA: Right. I think there is a big problem on one of the points and that is somehow attempting to qualify spontaneous uses.

THE COURT: If there are problems let him specify and let him know what the problem is.

MR. HRUSKA: Yes, I will.

I have just been handed a note Mr. Sipes is in Los Angeles. I don't know if that would affect it . I think I had the impression that Mr. Sipes had come back in the afternoon and had given testimony on the portion of inventory that was acquired after what was the date, January '70

THE COURT: Well, check that.

MR. HRUSKA: We are going to check it.

THE COURT: Anything further, Mr. Topkis, that is on your mind at the moment?

MR. TOPKIS: I don't think so, your Honor.

THE COURT: All right, then we are adjourned till ten o'clock tomorrow.

(Adjourned to Thursday, May 17, 1973, at 10:00 A.M.)

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	1669	7	margin, contributes	margin, which contributes
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	1693	8	Br ettler	Brettler
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	1694	12	Spinner	Spina
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	1700	15	CTN, FCTN	CTN, if CTN
	1702	5	standing up front money	money up front
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	1709	23	them	it
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	1720	8	uses, it will pile	uses, and pile
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1798- 9

ITED STATES DISTRICT COURT
OUTHERN DISTRICT OF NEW YORK

OLUMBIA BROADCASTING SYSTEM	:	Before:
	:	HON. MORRIS E. LASKER,
vs.	:	District Judge
	:	
MERICAN SOCIETY OF COMPOSERS,	:	
UTHORS & PUBLISHERS, ET AL.,	:	69 CIVIL 5740
	:	
DEFENDANTS.	:	
	:	

New York, May 17, 1973

STENOGRAPHER'S MINUTES

Columbia Broadcasting System

vs. 69 Civ. 5740

American Society of Composers
Authors and Publishers, et al.

New York, New York.
May 17, 1973 - 10:00 A.M.

(Trial resumed.)

MR. HRUSKA: I would like at this time, your Honor, to call to the stand Mr. Walter Dean.

W A L T E R L. D E A N, called as a witness by the plaintiff, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HRUSKA:

Q Mr. Dean, by whom are you employed?

A I am employed by CBS Records Division of Columbia Broadcasting System, Inc.

Q What is your position at CBS Records?

A I am executive vice-president.

Q Are you also an officer of April Music, Inc. and Blackwood Music, Inc.?

A Yes.

Q What are those companies?

A Those are music publishing subsidiaries of CBS.

Q Before asking you about the music publishing business, I'd like to inquire briefly about your background.

Could we start with your educational background?

A Yes. I graduated from the University of Michigan in 1948, and from the University of Michigan Law School in 1951. I then worked for the firm of Loweasten, Pitcher, Amann & Parr, and thereafter in 1956 I came with Columbia Records in their law department.

Subsequently, in 1957, I became assistant general attorney.

In 1958, I became director of business affairs.

In 1962, vice-president, business affairs.

Q This is business affair s CBS Records?

A CBS Records, that is correct. And in 1971 -- 19 --

THE COURT: Don't worry about it.

Q '66?

A '66, administrative vice-president. In 1971, executive vice-president, CBS Records.

Q When did you become a vice-president of April and Blackwood?

A In 1962, I believe.

Q As part of your responsbilities with CBS Records or with April and Blackwood, have you come in contact with music -- other music publishers?

A Yes. I dealt with music publishers on a regular basis, both as a member of the law department and subsequently in my business affairs capacity.

Q What part of your responsibilities in the business affairs departmet of CBS Records has brought you in contact with music publishers?

A In terms of dealing with publishers for mechanical rates for the licensing of compositions for use on phonograph records, also for publication of lyrics in folios and other printed matter with our recordings.

Also, the broadcast of original cast recordings that were made by us.

These were things that were handled in the business affairs aspect of the record activities.

Additionally, in terms of my responsibilities for the publishing company, I had occasion to meet many times with music publishers and to deal with them on an extensive basis on almost all matters relating to music publishing.

Q Is it possible for you to approximate the number of

music publishers that you have had dealings with over the years?

A No, it's not possible to give you an approximation, but I have dealt with most of the major music publishers, Chappell and the Big Three, MPHC, which is now the Warner group, Bourne, Frank Music, all of the well-known companies I have dealt with.

Q Could you briefly describe your responsibilities with respect to April and Blackwood?

A At the present time?

Q Yes, sir.

A Well, at the present time the general manager of April and Blackwood is Charles Koppelman. He is vice-president and general manager of both companies, and for simplicity I think we can refer to April Music, Inc. and Blackwood Music, Inc. generally as April-Blackwood.

Q All right.

A Mr. Koppelman reports to Elliot Goldman, who is our administrative vice-president.

Q In CBS Records?

A In theCBS Records Division, and Mr. Goldman in turn reports to me.

In that capacity, I am responsible for the ultimate profitability of the April-Blackwood operation.

I am not involved in that on a day-to-day basis, but I am responsible in the sense for policy and planning.

Q Was there a time during which you did engage in the day-to-day activities of April-Blackwood?

A Yes. Prior to my assumption of my present position as of 1971, during the period from approximately 1964 through 1971, I was responsible on a day-to-day basis. I was actively involved in the operations of April-Blackwood.

Q Could you describe the particular steps in which a music publisher engages in commercially exploiting a new musical composition?

A Yes. The primary step in the exploitation of a composition is to obtain a recording, and once that recording is obtained, then to work with the publishing -- with the record company to popularize the recording.

Q Once the phonograph record is made, what is done to popularize it and who does it?

A Well, as I said, the publishing company works with the record company. The record company usually has the primary responsibility, but the efforts are similar both on behalf of the publishing company and the record company and that's essentially to take it to radio stations primarily, and try to get it played as much as possible.

MR. TOPKIS: Excuse me.

A And there you would deal with the disk jockies, music directors of radio stations.

THE COURT: Mr. Topkis?

MR. TOPKIS: I just want to know. The witness was speaking of the record company. By that does he mean CBS Records?

THE WITNESS: No, I am talking about a record company generally because I am talking about how a recording is popularized, how a composition is popularized.

THE COURT: On a customary basis?

THE WITNESS: Customary basis.

Q Let me just ask you this: Are phonograph records of compositions in the catalog of April and Blackwood made by companies, made and sold by companies other than CBS Records?

A Oh, yes.

Q Is that a substantial amount?

A Oh, yes.

Q We were talking about promotional efforts and I think you commented on the efforts directed toward disk jockies and radio stations.

Are there any appreciable efforts devoted to

promoting the record or the song embodied on the record or any particular song to television networks or theproducers of television network programs?

A Well, not to television networks, and little if any to producers of television network programs.

Q Why is that?

A Well, because in order to create popularity for a song, repeated air play is required, and this is not feasible with television, television networks, because of the programming practices of television as compared to radio.

With television, if a composition is performed on the air, the likelihood of further performance of that composition is reduced. In other words, the producer of a program willtry to avoid duplicating what has been programmed on another competing network.

Q Or the same network?

A Or on the same network because he wants his program to be fresh and original, so that would be one aspect of it.

The other aspect is that television typically is programming standards, established compositions, or material written expressly for a particular program.

THE COURT: What stations do April and Blackwood, what kinds of stations do they gun for getting on? In the Metropolitan area can you mention some of them?

THE WITNESS: What they try to go after are what are known as Top Forty Stations, the stations that program latest recordings on a repeated basis, the kind of programs that many people turn off because they get tired of hearing the same songs programmed time after time.

THE COURT: What stations would they be?

THE WITNESS: WABC, for example, in New York, and some of the other stations might be WNEW and the format which is all music, and with disc jockeys.

THE COURT: Right.

Q I take it there are stations outside of New York to which comparable efforts are devoted?

A Yes.

Q How do you determine whether, let's say, a single television network performance of a musical composition has had an effect on the sales of the phonograph record embodied in that composition?

THE COURT: How do you determine--

MR. HRUSKA: Maybe I can rephrase it.

THE COURT: No, it is not complicated. I just missed a couple of words.

How do you determine what influences the record?

MR. HRUSKA: No, how do you determine whether, say, a television network performance of a musical composition has had an effect on the sales of a phonograph record embodying that composition.

THE COURT: You are asking him particularly with reference to the determination of the effect of showing on television?

MR. HRUSKA: Yes. The question is related to that.

THE COURT: All right.

A Well, I can't determine that with any degree of precision, but if there has not been a change in the radio station programming pattern of a particular composition or a particular record, and there is a performance of that composition on television and you notice the sudden spurt of sales in the areas where that program was broadcast, the network program, television network program is broadcast, then you would deduce from that that the television programming has had an impact on the sales of that particular composition.

Q Have you, or to your knowledge, has CBS records had occasion to observe whether or not a television network performance of a musical composition has increased the

sales of a phonograph record in the stores?

A Well, it is a very rare thing. I mean there are occasions that this has happened, perhaps once every five or ten years, and they stand out and people recall particular situations.

Q Do you know an example of that?

MR. TOPKIS: What was that question, please?

MR. HRUSKA: An example.

A Many years ago there was a song performed on television called "Let Me Go, Lover," and in that situation, there had been no prior recording of the composition, but because of inquiries in the stores about the availability of the composition, of the record, the person who performed that song was subsequently signed to a contract and a recording was made, and -

THE COURT: I am unfamiliar with the song. Is it "Let Me Go, Lover," or is it "Let me Go, Love Her"?

THE WITNESS: Lover.

Q Can you think of any other examples?

A That's the one that immediately comes to mind as an outstanding example of that situation.

Q In your experience, does a television network performance of a musical composition increase the possibility that radio station disc jockeys will play the

composition, the phonograph record?

A No, I don't think radio station disc jockeys could care less what is programmed on network television. They have their own programming practices. They are not concerned with what is programmed on television, and the fact is that on television, as I have indicated before, the music that's programmed is typically standard or material written expressly for the program; or records that -- the newer recordings, newer songs that are at or near their peak of popularity, and are not likely to pick up additional radio plays as a result of their television exposure.

Q I'd like you to assume for a moment, Mr. Dean, that ASCAP and BMI are no longer licensing television networks; and that all licensing of television networks is done on a direct basis between packager or producer of program on the one hand and music publisher or copyright proprietor on the other hand.

Assume further that the producer of, let's say the Dean Martin Show, which I think is on NBC, approaches you and he says, "Mr. Dean, Andy Williams is coming on our program as a guest star, and he says he wants to sing song X and song X is in your catalog, and we'd like" says the producer "to negotiate a direct performance rights license with you."

Are you likely to be willing to grant that producer in these circumstances a performance rights license at a very low fee, let's say, $100, for the sake of having Andy Williams sing that song on the Dean Martin Show?

A Well, we would want in that situation to get the maximum amount for the right that we are granting, because the fact is that if Andy Williams wants to record that song, the likelihood is that he is not going to change his mind because the fee might be somewhat higher than the minimal fee that would be asked.

Q Do you have any idea what you might charge under those circumstances?

A No, I have no idea. It would depend on the nature of the particular performance, you know, whether it was part of a medley or a complete performance of the song and we would try to get as much as we could.

We would inquire what other publishers were getting for similar usages and we would try to maximize the income potential.

Q Do music publishing companies still publish sheet music?

MR. TOPKIS: Does what?

Q Do music publishing companies still publish sheet music?

A Just a few of the majors publish their own sheet music. In most other cases, it is licensed to third parties, companies such as Hanson Publications or smaller companies by the name of West Coast Music Publications have licensing agreements with a large number of the smaller publishers and they do the sheet music and other print rights for the smaller publishers; for most publishers.

Q Mr. Dean, does the term "Show Tunes" have any well-defined meaning in the music publishing business?

A Well, show tunes generally refer to songs from

Broadway productions. To some extent it might also be applied to songs from motion pictures.

Q Do you know which publishing companies in 1966 controlled substantial amounts of Broadway show tunes, who the biggest were?

A Well, the biggest probably was Chappell at that point in time.

THE COURT: I didn't hear that.

THE WITNESS: Chappel, C-h-a-p-p-e-l-l, and also important in the Broadway show tune area were Frank Music and E. H. Morris.

Q What about in the movie area?

A In the motion picture area, probably the biggest publishers were the MPHC group, which is now the Warner group, The Big Three, Robbins, Feist and Miller, and to a letter extent, Famous Music Corporation, which is Paramount Famous or Famous-Paramount.

Q Is there any rule of thumb in the music publishing business as to the price earnings ratio at which music publishing companies are bought and sold?

MR. TOPKIS: I beg your pardon? This witness certainly is not qualified on that subject, at least not yet.

THE COURT: Well, why don't you ask him some

questions about his experience in regard to that subject?

Q Have you, Mr. Dean, ever studied the question of price earnings ratios at which music publishing companies are bought and sold?

A Well, we have from time to time considered the acquisition of music publishing catalogs.

Q And in that connection, have you made it your business to find out what the price earnings ratios have been?

A Well, it is not a price earnings ratio as such but there is a formula that is generally used within the industry for establishing the value.

THE COURT: If there is a customary formula in the industry and you are acquainted with it as a result of your experience, I'll allow you to say what it is.

THE WITNESS: Right.

A That would be a formula of six or seven to ten times ASCAP earnings, the formula that is used.

THE COURT: This is for the acquisition of a catalog?

THE WITNESS: Exactly. Music publishing catalog.

THE COURT: Six to seven--

THE WITNESS: Six or seven to ten, you know, within that range.

THE COURT: Of ASCAP earnings?

THE WITNESS: Right.

THE COURT: Of course, that means the earnings of the publisher whose catalog you are acquiring?

THE WITNESS: Exactly.

THE COURT: Or the catalog.

Q Do you know why it is a ratio expressed in terms of ASCAP earnings, rather than total music publisher earnings?

A Yes, because apart from ASCAP earnings, a music publishing company would have earnings from recordings, which would be records, and also, I suppose, synchronization fees that are a very small sum, usually, from synchronization fees, and from print-- sheet music and other print-- and the earnings from recordings and from sheet music would not tend to continue over a long period of time; they repeat and they would fall off rather rapidly after the initial hit, while earnings --

THE COURT: You mean whether the catalogs were sold or not?

THE WITNSS: Yes. It has nothing to do with the sale. It is just the nature of the business.

THE COURT: It is a short life.

THE WITNSS: Short life of the mechanical and

sheet music income, although a song could be revived and subsequently show the same peak earnings, whereas ASCAP earnings over a period of time do run at a more precise range and you don't find the same peaking. The song remains in the ASCAP catalog and earnings can be judged to fall within a certain defined range.

Once you know what it's been, then you can project what it will be in the future.

Q Now, I would like you to assume, Mr. Dean, that the CBS Television Network cancels its ASCAP and BMI licenses; that the NBC and the ABC Television Networks retain their ASCAP and BMI licenses; and, that after CBS cancels its licenses, you on behalf of April-Blackwood are approached by a number of packagers of CTN programs, independent packagers, and those packagers seek to interest you in negotiating direct performance rights licenses to them for their programs.

Would you be willing or unwilling to enter into such negotiations?

A I take it you are talking about matieral which was at that point in the April-Blackwood catalog, not material to be created in the future?

Q Yes, sir, in the April-Blackwood catalog.

A We would be unlikely to deal with those television

producers.

Q Why is that?

A Well, because we have a competitive situation in the music publishing industry where we are dealing for new and established writers and in dealing with those writers, we have to protect their interests, basically, and if they believe that we would be prejudicing their interests by departing from an established system of licensing public performances through ASCAP, going direct, instead, that would seriously jeopardize our ability to deal with writers.

Q Assume that the CBS Television Network-- this is a new set of assumptions-- assume that the CBS Television Network announces that some time in the future it wants to cancel its ASCAP and BMI licenses and that it is going to embark upon a project of attempting to option music publishers' catalogs, and in that connection the CBS Television Network approaches you, again on behalf of April-Blackwood-- and puts to you the following proposition, which the network says it wants to negotiate:

1: The network would like an option to your catalog for which it would be willing to pay you some negotiated lump sum fee;

2: The network would want to exercise that option in the event it was able to option enough music to

permit the cancellation of the licenses;

3: If the network exercised the option and used music from the April-Blackwood catalogs, it would pay April-Blackwood stipulated per use fees for each use, those fees also to be negotiated.

Would you enter into such a transaction with the CBS Television Network?

MR. TOPKIS: Before the witness answers, could we know the identity of the negotiator on behalf of CBS? Would it be William S. Paley, Frank Stanton or someone else in a capacity to make the witness an offer he would have difficulty in refusing?

MR. HRUSKA: Let's make it realistic and let's say the negotiator who approached you on behalf of the CBS television network is Donald Sipes.

THE COURT: Let me also, if I am correct in assuming that in the second hypothetical case, NBC and ABC still have licenses from ASCAP and BMI.

MR. HRUSKA: Yes, your Honor.

A Well, for the reasons that I gave before, that is, our relationship with our writers and the need to remain competitive in the business, you know, it is unlikely that this approach would be more attractive than the prior approach.

We would also have a problem in terms of option money in determining how to distribute that option money and, in fact, I think that it might on the part of many, depending on the amount of consideration that was given for the option, if it were a nominal consideration, then there is no inducement on our part of even consider it seriously.

If it is a large consideration, then there might be a concern on the part of many writers that what we were doing in effect was getting a large consideration for the option and taking that money and putting it in our own pocket and the per-use payment would not be what it should be under the circumstances.

There have in fact been some situations where print music deals have been made and they were rather notorious in that a large amount of money is given as an advance with a per-use payment for the actual print and the writers in many cases feel that their material is being utilized and they are not being paid adequately for it.

I think that you also have, and that may be a reflection of the print situation, you have in the AGAC contract a prohibition against bulk licensing and I think it may relate to the allocation in the fairness to the writers of the way their money is distributed.

Q Couldn't you think of some way of distributing this up front option money that would make your writers happy?

A Inevitably there would be some writers who would feel that the distribution method was not being fair to them.

I mean, if they were writers of established songs, they would say that the bulk of the money should be distributed to them; if they were writers of songs who were not used, they would expect a fair share, irrespective of what was used, so that it does tend to create a problem with key writers.

Q In your opinion, Mr. Dean, are writers unusually sensitive on this subject of up front money going to publishers?

MR. TOPKIS: Objection, your Honor.

THE COURT: I don't know what the word 'unusually" means. I gather they are sensitive to it. Like all the rest of it, they would like to be sure they make as much from their talents and accomplishments as anyone else does.

I understand the point of view.

A Yes.

THE COURT: I would like to ask this just to educate myself -- do your present agreements with writers indicate in any way what would happen if you did get any such money, whether it is from CBS or anybody else? I am not quite clear. There must be some prescribed method by which this is to go or are you saying that you are entirely free to do with the money at the present time

what you like.

A Well, the present agreements typically don't provide for distribution in respect of public performance. They talk in terms of the writer's share being distributed through the society and I think that consequently, if the writer's share were not distributed through the society, then the catch-all formulas of the agreement would come into play, whereby it would be a distribution of other income, probably on a 50-50 basis, but it doesn't specifically provide how that would be allocated as among different writers so that if you get a lump sum, you would then have that allocation difficulty.

THE COURT: You don't have any agreement with AGAC for example, which would specify --

THE WITNESS: The AGAC agreement specifically provides that there won't be any bulk deals without their written approval.

THE COURT: In such an arrangement as this, would you have to work it out with AGAC?

THE WITNESS: We would have to go to them, but I doubt they would consent to it.

THE COURT: Assume they consented. They would then be able to condition that consent on the method

of distribution?

THE WITNESS: Yes, they could.

THE COURT: Thank you.

Q Are you aware, Mr. Dean, of any market machinery or apparatus which has been established for mechanical rights transactions?

A Well, of course, there is the Harry Fox office and I assume that publishers have people, most publishers have people in their offices who deal with rates generally.

Q In mechanicals?

A In mechanicals, right.

Q Does April-Blackwood deal through the Hary Fox agency?

A Yes, they do.

Q Are you aware of any market machinery other than ASCAP and BMI which has been established for the licensing of performance rights to television -- for television use?

A No, I don't know of any other machinery.

THE COURT: SESAC, does that do that or not?

MR. HRUSKA: SESAC.

MR. TOPKIS: It is a small society, but there are doubtless those who love it.

THE COURT: I know there are, because I have

one of their suits pending before me.

MR. HRUSKA: I have no further questions of this witness.

THE COURT: All right.

MR. TOPKIS: We have a couple of minutes, your Honor?

I am sure my cross will be very brief.

THE COURT: Yes. Will you call me as soon as you are ready?

MR. TOPKIS: Surely, your Honor.

(Recess.)

CROSS-EXAMINATION

BY MR. TOPKIS:

Q Mr. Dean, according to an article, as Joe McCarthy used to say, I hold in my hand, in cash box, CBS Records achieved double the chart listings of its songs over that of its competitors in the first quarter of 1973.

MR. HRUSKA: I am sorry, I missed a couple of words.

MR. TOPKIS: If the reporter got them, may I have him read it back.

(Question read.)

Q Is that correct?

A You've got the article in your hand, I see.

Q Right. Is it correct according to your understanding?

THE COURT: In other words, does the article correctly state the facts?

A No, I haven't independently made the analysis, so I really don't know the answer to that.

Q Is it your understanding that CBS Records is far ahead of any of its competitors in chart listings?

A It is my understanding that they had a very successful first quarter in music publishing, that is

correct.

THE COURT: Are you talking about the chart listings? I know they go together, but that is what you are being asked about.

THE WITNESS: In chart listings, yes, sir.

THE COURT: That means popularity?

THE WITNESS: Right.

THE COURT: Roughly speaking.

Q You are ahead of any of your competitors?

A No, I said that we were ahead of what we had done in chart listings in comparable first quarters but I don't know that we are ahead of what the competition had done in chart listings. I haven't made that analysis.

Q You just don't know?

A No, I don't.

Q According to an article I have from Billboard, dated February 17, 1973, Columbia finished first in a 12-month survey of Billboard's hot 100 for the year 1972.

Does that accord with your understanding?

A Columbia Records you are talking about?

Q That's right.

A That's correct.

THE COURT: For what period was that, Mr. Topkis?

MR. TOPKIS: That was for the year 1972, your Honor.

Q Today Columbia Records is the largest seller of records in the United States, isn't that right?

A Yes.

Q Your distributions from ASCAP, that is, April's distributions from ASCAP, have been running between 200,000 and a quarter of a million dollars a year for the last few years, isn't that right?

A Yes, they have been substantial, but I don't know the exact amount.

MR. HRUSKA: Your Honor, we at another point in this case did obtain from ASCAP, under a protective order, the ASCAP distributions to the top 50 ASCAP publishers. At that point ASCAP made quite a point about the confidentiality of that material. I think it unfair. I object to Mr. Topkis disclosing in open court the distributions to one of the ASCAP publishing members, in this case April Music. I think it is inconsistent with the position that ASCAP has taken with respect to its other publishing members.

THE COURT: I can't tell whether it is inconsistent without knowing the reasons that prompted the original concern, whether it was concern for non-parties or

whether it was concern for ASCAP's own figures which of course is something else, or what it was.

MR. HRUSKA: It was expressed in terms of concern for the individual publishing members.

MR. TOPKIS: That was it, your Honor, but I can't imagine Columbia can come into this courtroom and bring a lawsuit and complain about some inconsequential a figure as this becoming public.

If Mr. Hruska wants, let's seal the page on which I asked the question. I couldn't care less.

THE COURT: All right.

Q Have Blackwood's receipts from BMI been comparable to those of April from ASCAP?

MR. HRUSKA: I pose the same objection, your Honor.

MR. TOPKIS: I am willing to accept the same treatment. I just want the fact, that's all.

THE COURT: Certainly Mr. Topkis is entitled to bring out the information. Is there somebody in the courtroom you are concerned about or do you want me to get this in the robing room? Since I don't understand the reason that prompted the concern about the revelation of the figures, I can't really comment as to whether there is some

justification.

MR. HRUSKA: I am at a loss too, because I don't know offhand right now how proprietary this information is. I am really basing this --

THE COURT: As a CBS stockholder, if I were one, I might want to know it, so it doesn't seem to me that there is -- are you concerned about the revelation of these figures?

THE WITNESS: I think the figures do have, in our industry, a certain proprietary value, and they are not typically made available. It is -- it does have significance.

THE COURT: Then I will ask -- I don't know who is in the courtroom, so --

MR. HRUSKA: I believe there is a reporter for Trade Press here, your Honor.

THE COURT: Then I will ask Mr.Dean to make the figure available in writing, and submit it to defense counsel myself, and used as appropriate in the record.

MR. TOPKIS: Fine, let's have them for the last five years.

THE COURT: All right.

MR. HRUSKA: ASCAP and BMI know the figures,

your Honor. They don't have to call upon us to supply the figures.

MR. TOPKIS: I know the ASCAP, but I don't know the BMI figures. Can't we stop wasting time here, your Honor? This is just so silly.

THE COURT: What is your worry now?

MR. HRUSKA: My concern, your Honor, is simply that we have had this controvery for a good deal of time about the proprietary nature of these figures, and --

THE COURT: Do you mean you are opposed to my noticing them?

MR. HRUSKA: No, no.

THE COURT: That is all I am suggesting.

MR. HRUSKA: Let me just drop the point, your Honor. We will handle it that way.

THE COURT: All right.

Q Now you said something about performances on television not creating any measurable upsurge in record sales typically.

Do you remember that testimony of a few minutes ago, Mr. Dean?

A Yes.

Q There is a rare exception, you said, and you

cited "Let Me Go, Lover." Do you remember that?

A Yes.

Q That occurs also, does it not, when a noted performer does a special on television, isn't that right?

MR. HRUSKA: I object to the form of the question, your Honor, what occurs.

THE COURT: Overruled.

MR. HRUSKA: And what television are we talking about?

MR. TOPKIS: What television were we talking about? United States, for example.

THE COURT: Mr. Dean is a very sophisticated man. He is an attorney. He can ask if he has any doubt about the meaning of a question.

Let's get the question again, please, Mr. Reporter.

(Record read.)

A I would say that the situation of response or lack of response that I alluded to before, would be applicable equally to a situation where a performer does a special, that's right. It would not be an appreciable response at the record store.

Q If Barbra Streisand does a special; haven't you observed sales jump?

A Well, we are talking about two different things, I think.

You in your original question were talking about the impact on record sales of a particular composition programmed on network television, and you are talking about a Barbra Streisand Special.

When you are talking about a Barbra Streisand series or an Andy Williams series, you are talking about the exposure of a performer.

The exposure of a performer can have a significant impact on the sales of that performer.

The point that I had alluded to previously was the exposure impact on the sales of a particular composition.

I would distinguish between the two situations as having different impacts.

Q I see.

Just let me offer you an example to see if we understand each other. If Barbra Streisand goes on television and sings "People", a Julie Styne song, that is not going to have any significant impact on somebody else's record of "People"; is that what you are driving at?

A Nor of her recording of "People" if that's a current hit at that point in time.

Q If it isn't a current hit, however, at that point in time?

A Then it certainly does not have any effect.

Q I see.

But if she does a special, you would expect an elevating effect on her records generally?

A No, what I have said is that if she does a special, it is more likely to have an impact on record sales.

Q Her record sales?

A Than if she just performs-- yes, her record sales..

Q All right.

THE COURT: Than if what?

THE WITNESS: Than if she just performs an individual composition as a guest performer on somebody else's special.

Q For whom does Carol Burnett record?

A Carol Burnett records for Columbia Records.

Q Am I right in believing that the majority of ASCAP performance credits received by April-Blackwood in recent years have been for performances of theme and background music on CTN?

A I think you are correct.

Q And am I correct in believing that April-Blackwood receive their interest in theme and background music copyrights by agreement with CTN?

A There is an existing license agreement between April Music and Blackwood Music and the CBS Television Network providing for the licensing to April and Blackwood of copyrights owned by the television network, that is correct.

Q Providing for the licensing to April and Blackwood or designating April and Blackwood as the recipients of performance rights revenues from ASCAP to BMI?

A No, providing for the licensing of that material to April and Blackwood.

Q Whatever the form of the agreement, the result is that April and Blackwood receive performance distributions from ASCAP and BMI for such compositions, is that right?

A That is correct.

Q April, Blackwood, and Columbia Records all report to the same chief; is that right?

A Ultimately, yes.

THE COURT: We all do ultimately.

MR. TOPKIS: Him or Her, as the case may be.

Q And people at Columbia Records and people at

April and Blackwood know that; don't they?

A Presumably.

Q By presumably, you mean that everybody except the idiots know that, don't they?

A Well, I don't think people really think in terms of ultimate reporting responsibility on a day-to-day basis. They are engaged in different businesses and they operate their different businesses.

Q Mr. Dean, do you remember your deposition being taken on the 14th day of March, 1973, at the offices of Paul Weiss at 10:10 a.m.?

A Yes.

Q And at page 59, line 10, -- I will go back to line 3 -- I will ask you if you were asked these questions and gave these answers.

THE COURT: Mr. Hruska?

MR. HRUSKA: I think the method we were pursuing on that was for the deposition to be given to the witness, allowing him to read it; if there is an inconsistency, allowing him to reconcile it or your Honor to get the deposition.

THE COURT: Not on cross-examination. This is full cross-examination.

MR. HRUSKA: All right.

THE COURT: The ruling that I concocted had to do with the witnesses that you called who were moderately in disagreement with you.

MR. HRUSKA: Right. Of course.

Q Mr. Dean, were you asked these questions and did you give these answers?

MR. HRUSKA: What page?

MR. TOPKIS: Page 59, line 3.

Q 'Q And indeed people at Columbia Records and people at April-Blackwood know that ultimately they all report to the same chief; do they not?"

And you answered:

"A Presumably."

Then I asked you at line 10:

"Q I don't mean to argue with you, but by 'presumably,' do you mean to say that everybody except the idiots know that?'

And you answered:

"A Exactly."

Now, you were asked those questions and gave those answers, right?

A Yes.

Q And they were true and correct, to the best of your knowledge and belief, is that right?

A Yes.

Q There has not been any sudden flux of idiocy at April-Blackwood and Columbia Records, has there, since March 10th or whatever it was?

A Well, I don't believe so.

Q This relationship, that is to say, among April, Blackwood and Columbia Records, is an influencing factor in which publishing house winds up with the copyrights of music recorded by Columbia Records; isn't that right?

A Would you restate that question?

MR. TOPKIS: Let the reporter read it back, please.

(Question read.)

A Well, I don't think it is a material factor but it certainly could be called an influencing factor.

Q It is an influencing factor but not a material factor; is that your testimony, sir?

A Yes.

Q All right.

Mr. Dean, April and Blackwood use the AGAC form of contract in less than half of their dealings with writers; don't they?

A Probably.

Q Do you have any doubt about it?

A I really have not specifically inquired in what percentage of the cases the AGAC form is used. It would depend on the writer in many cases.

Q But you would think that it's been used in less than half of the cases since 1963, would you not?

A I would think so.

Q Mr. Dean, you testified that when a music publisher is sold, it is typically sold for from six to ten times its ASCAP royalty or ASCAP distributions.

Do you remember that testimony?

A Yes.

THE COURT: With the refinement that he was talking about the sale of the catalog.

I don't know if there is a distinction.

MR. TOPKIS: Sale of the catalog.

Q And I take it if it is a BMI house, it would be six to ten times its BMI distribution?

A I think the formula might be somewhat different in terms of BMI than ASCAP.

Q Could you tell us what it would be?

A I don't have an opinion offhand as to the BMI formula. The companies that we have looked at have been primarily ASCAP companies in terms of having old time standards, and I don't have a BMI formula.

Q So that your answer to the question that you gave before, when Mr. Hruska was interrogating you, was in terms of offers that you received from ASCAP catalog owners?

A No. It was in terms of the formula that was applied in evaluating an ASCAP catalog and it is a formula that's been expressed in the trade press and also in

discussions that I have had with other publishers in trying to evaluage what such a catalog might be worth.

Q And the catalogs that you were trying to evaluate were catalogs of publishers whose catalogs were predominantly stnadard, established works, is that right?

A They had a large amount of standard repertoire in their catalogs, that's right.

Q And that is why you said that their ASCAP distributions tended to be relatively without peaks and valleys?

A That is correct.

Q It might be a very different thing for a publishing house which specialized in or tried to specialize in current hits, is that right?

A I have never heard it expressed differently, depending on the nature of the catalog. It is just expressed in terms of the ASCAP earnings and it is used for newer catalogs in the ASCAP repertory as well as the older catalogs.

Q You bought Tuna Fish Music, Inc.?

A Right.

Q Was that an ASCAP house?

A No. BMI.

Q Do you remember what multiple of earnings you

paid for that -- multiple of distribution, rather?

A Well, the price of that has not been publicly disclosed.

Q I am not asking for the price, sir.

I am asking for the multiple.

A That was not evaluated in terms of the ASCAP or BMI earnings.

Q That was a publishing house that had a contractual relationship with Miss Laura Nyro?

A That is correct.

Q And that publishing house specialized in publishing her compositions?

A That was the only material it published.

Q Just so that what Mr. Belnick and I know is spread on the record and what I bet you know, Miss Nyro is a performer and composer of very significant popularity today, is she not?

A Yes, she is.

Q Do such performers have their ups and downs?

A In terms of what?

Q Public acceptance.

A No. It is difficult to give a direct answer whether they have ups and downs in terms of public acceptance.

A performer who is established because of the

uniqueness of the performer, doesn't have ups and downs as such.

The popularity of the recordings at a particular time may go through ups and downs. But the performer as such doesn't go through ups and downs in terms of acceptance.

Q A performer does not?

A No.

Q Have you heard much about The Supremes recently?

A They have broken up as a group; that's why you don't hear about them.

Q Actually, they continued for a time after Miss Diana Ross left them, didn't they?

A Well, the point is that even when Frank Sinatra was not selling records, his acceptance and his notoriety and the public's appreciation of him still may have existed in certain areas. I mean you could have an artist who was not selling records at a particular time who in clubs will continue to draw record crowds.

Q You testified that in a situation where CTN came to you and wanted a direct license for one of your compositions, you would be concerned about how your writer would react to such a license, right?

A That is correct.

Q You have heard the term per use licensing?

A Yes.

Q And you have heard that in this litigation CBS is seeking to establish a world in which per use licensing would exist?

A Yes.

Q Let me ask you, sir, in a per use world, if you were approached for a direct license by a packager, would you be concerned about the reaction of your writer?

A Well, if by per use world, you mean a situation where there was no other licensing procedure, where ASCAP and BMI didn't exist, and where all publishers were licensing on a direct per use basis, I would have no concern about giving a per use license under those circumstances.

Q No, that is not quite the world that this litigation envisages, as I understand it, and so that we may be sure we understand each other, let me spell it out for you a little bit.

Let us suppose that ASCAP and BMI continued to exist and CTN holds a per use license from ASCAP and BMI but of course in that world as we understand it, direct licensing will also be available.

What I want to know is, in such a world, if a packager came to you seeking a direct license for one of

your compositions, would you be concerned about the attitude of your writer --

MR. HRUSKA: I object to the form of the question, your Honor. It is too vague?

THE COURT: I don't know that it is too vague except that I want to be sure of one thing.

Are you assuming that although CTN operated on the per use basis, that NBC and ABC would not be operating on that basis but on a blanket basis?

MR. TOPKIS: That is a matter of irrelevancy to me, your Honor.

THE COURT: It may or may not be to the witness. I think you ought to assume one or the other.

MR. TOPKIS: I'll take it eithe way.

Q Let us assume that ABC and NBC also had per use licenses.

A And your question is would I be concerned about dealing in that kind of a situation?

Q No. My question is, would you be concerned about the reaction of your writer if a packager came to you and said, "I would like a direct license to perform a composition on a program that I am putting together for CTN."

MR. HRUSKA: Your Honor, I object to the question

because I do not think a sufficient number of details regarding what this per use license consists of have been stated.

THE COURT: Then let's allow the witness to ask for more details, if he wants them.

He knows best what details he wants to have.

Do you need to have any further information? If so, ask for it, Mr. Dean.

A If you are talking about a per use license arrangement, can you tell me what mechanism is established for creating that per use license mechanism?

THE COURT: Mr. Topkis, do you mind if I answer as I understand the rules of the situation to be?

MR. TOPKIS: I would be delighted, your Honor.

THE COURT: I believe that Mr. Topkis is assuming what CTN has told us is their objective-- that is, that ASCAP would continue to license on a per use basis for all compositions whose writers had not withdrawn those compositions from the so-called reservoir or pool.

I don't know whether Mr. Topkis is assuming that the composition he is asking you to license has been withdrawn at that point or has not been withdrawn.

MR. TOPKIS: I would expect it would have been withdrawn, of course, your Honor.

THE COURT: So, the composer or author has the right to withdraw his composition from the pool and Mr. Topkis has assumed that he has done so.

Mr. Topkis is then coming around to you and saying now, "Would you directly license me for the use of performing rights for that song," and his question is, as I understand it, under the circumstances would you be concerned about the reaction of the writer.

A Would we, as a publisher, know what payment would be made in respect of that song, if it were still in the pool?

THE COURT: Presumably you would, by virtue of what it had been priced at before it had been removed; that is my understanding.

A If we knew what the price would be, if the song were still in the pool, then I would have no reluctance to deal directly outside of the pool, because then I could deal with reference to an established standard and if I asked the writer-- if I asked for a dollar amount in excess of the amount available in the pool, then clearly I would be getting more for the writer outside of the pool than if it remained within the pool.

Q Well, would you under a per use license arrangement leave your music in the ASCAP pool or would you withdraw it?

A That really is a decision that I am not prepared to make just sitting here, without giving it real deep consideration.

Q You haven't thought about that at all?

A No. I just have not thought about it at all.

Q Would you think that you would have to consult your writers before withdrawing large compositions from the pool?

A Well, you are talking about a monumental change in standard procedure and, clearly, before making any such change, we would want to get as many views as possible from the people who we would hope to deal with to get their reaction to that kind of a situation.

Q I take it, then, that you mean that before withdrawing any composition from the per-use pool, you would think you would have to consult with your writer?

A No. I am not saying that we would consult with our writer in each situation. I have said that before making a decision either way on what to do, we would want to get as many views as possible and explore the pros and cons and the way writers generally thought about it.

Q Under your AGAC form of contract which governs at least a very significant portion of your catalog, you must obtain the writer's consent to anysuch transaction, would you not?

THE COUR T: On the theory that it is a block

license?

MR. TOPKIS: No. On the theory that it is a television use and the contract calls for consent as to television use, J or K, I can't remember which subparagraph it is. 4J or K.

Q So you would need the writer's consent to withdraw?

A To the extent that it was covered by a contract, having that kind of a clause.

Q Right. So, once you had, with the writer's consent or without the writer's consent in some situations, withdrawn a composition from the per-use pool, would you then expect to consult with the writer before responding to a request for a direct license from a packager?

A It would depend on the nature of our relationship with the writer and it would also depend on the circumstances.

To the extent that it was a writer that we had a continuing current relationship with, we would be more likely to consult with that writer, but that consultation, I think, would be limited by and large to those situations where there was some extraordinary factor related to the particular usage and if it were a typical usage and what we were asking for the usage represented

an amount in excess of the amount that would be payable in respect of works within the pool, then in the ordinary course I would not expect us to consult with the writer in that situation.

Q Now, I have been asking you, sir, about what the situation would be, assuming that ABC and NBC and CTN all were operating under per-use licenses.

I will now ask you to change the assumption and assume that ABC and NBC both hold blanket licenses from ASCAP and BMI and ask you whether your attitude toward your writers would differ in any significant degree?

A No, I don't think it would differ in any significant degree.

Q Fine. Now, let me ask you this: Suppose NBC and AGC continued to hold blanket licenses from ASCAP and BMI and CTN dropped its blanket licenses with ASCAP and BMI and went on a direct licensing basis.

I think you testified before that you would expect that you would have to have some concern about the attitude of your writers in that situation, right?

A That's correct.

Q You would expect also, I suppose, though, that after a time, your relations with your writers would

stabilize, they would get used to what you were doing and with your more regular writers you would establish routines, would you not?

A Well, you are talking about a situation where the CBS situation, CBS Television Network situation, were distinctive from the situation with respect to ABC and NBC.

Q That's right. Just as I was a minute ago talking about the situation wherein the per-use world CBS situation was distinctive from that of ABC and NBC.

A I don't know what factors would lead it to stabilize. I don't believe that --

THE COURT: In the present hypothetical situation is merely what we have called from time to time in the course of the trial, a bypass under the present structure in the industry as distinct from per-use?

MR. TOPKIS: That's right.

THE COURT: You understand that?

A Well, the situation that I think you have in mind, that I understand you have in mind, is a situation where CBS is operating without a blanket license while the other networks have a blanket license?

Q Right.

THE COURT: Without any change in the industry structure?

THE WITNESS: Right. I don't know how the situation would tend to stabilize over a period of time, if nobody can function in that atmosphere, which was the original supposition.

Q What do you mean, nobody can function in that situation?

A In other words, you are assuming that publishers are in a position to give licenses to CBS there without jeopardizing their relationships with their writers?

Q No, I am not assuming anything of the sort. If you tell me that you would be concerned about your relationships with your writers --

A Well, that's in fact the case.

Q I am accepting that testimony for the moment.

I am asking you whether you regard your relation as being so shaky that you just wouldn't be able to solve that problem?

A Well, I think at all times you have got to assure writers that you are dealing with that they are going to get a fair shake in dealing with you.

Q I certainly agree with you.

A And anything which jeopardizes that position

would have a detrimental effect on the conduct of the business.

Q And if you gave them a fair shake, you would expect that there would be no detrimental effect, isn't that right?

A It's not a question of whethe ryou give them a fair shake. The questinn is whether they feel their interests are being prejudiced by your course of action.

Q And you think that they would not so feel in a per-use world but they would so feel in a direct licens: world, that is to say, where NBC and ABC both continued to have blanket licenses?

A Well, it's hard for me to answer your question in terms of a per-use world and a direct world. I think I have answered the questions that you have asked ard if there are specific clarifications you want, I can answer them.

It's hard when you get off into terminology.

Q I am sorry. I didn't hear the last words.

A It's hard when you get off into terminology, because I don't have the terminology fixed in my own mind the way you do.

Q It's been hard for me, too, I assure you. Let's suppose that in a per-use world, let's suppose NEC,

ABC and CBS all hold per-use licenses from ASCAP and BMI, a packager comes to you and says I would like a direct license for song X and I would like it at a lower price than the per-use price.

What would you do?

A It's hard for me to respond to your question because when you start using the per-use terminology, I really don't understand the context in which the situation arises and I can't focus on the question without the context so would you just give me the background of the situation you are talking about, rather than calling it a per-use world.

Q I will try, sir.

ABC and NBC and CBS all hold licenses from ASCAP and BMI, which provide that for a stipulated price per performance those networks may perform the compositions in the ASCAP and BMI repertories subject to those licenses.

Are you with me up to now?

A That is, for each use, they would pay a stipulated amount.

Q Right.

A Each use of any individual composition, they would pay a stipulated amount.

Q Right.

Now, the members of ASCAP and the affiliates of BMI have had the right to withdraw such compositions as they desired from coverage by those per-use licenses?

A Right.

Q I am speaking of a composition which remains subject to the license.

Are you with me up to now?

A Right.

Q It is one of your compositions and a program packager comes to you and says I would like a license from you at a lower price than the per-use price for that composition. Would you at that point feel that you had to consult with the writer involved?

A It would depend on the particular composition. If we had a composition in our catalog that had no real activity or income over a long period of time and it was not a composition that I felt had significant commercial value, I might take whatever I could get for that particular composition.

MR. TOPKIS: We have no further questions. Thank you.

CROSS-EXAMINATION

BY MR. DAVIDSON:

Q Mr. Dean, you are the man that is in charge of the factories that make the records sold by CBS Records, is that right?

A I have ultimate responsibility for factory operations, correct.

Q And you also have responsibilities for 85 retail stores owned by CBS?

A Sixty-five.

Q In fact, your responsible in connection with April and Blackwood are very limited, are they not?

A The responsibility is a profit responsibility.

THE COURT: If that is a limited responsibility, I wouldn't view it as such.

Q I ask you whether you remember being asked this question and giving this answer at your deposition, Page 8, Line 7:

"Q What are your responsibilities at April-Blackwood?

"A I have no responsibilities at April-Blackwood."

A I don't remember that specific question or the context in which it was asked, no.

Q And in fact you don't have an office at April and Blackwood?

A No, that's correct.

Q Did you get involved with April and Blackwood prior to the time when you became administrative vice-president?

A Yes.

Q When was that?

A I first became involved with the activities of April-Blackwood probably around 1964, although I became a vice-president prior to that time.

Q And in 1967, CBS Records hired a man named Neal Anderson, did they not?

A That's correct.

Q And Mr. Anderson was hired to run April and Blackwood?

A That's correct.

Q And Mr. Anderson operated April and Blackwood from 1967 to 1971, is that right?

A That's correct.

Q And Mr. Anderson had more contact on a day-to-day basis with publishers and writers than you did?

A Yes.

Q You testified previously concerning a license between CBS Television Network and April and Blackwood,

under which April and Blackwood got the public performance rights on compositions owned by the network?

A I testified as to a licensing agreement between the television network and April Music and licensing agreement between the television network and Blackwood Music. I didn't characterize it.

Q So there are two separate license agreements?

A Right.

Q Did I correctly characterize them in my questi[on]?

A I don't believe that is a correct and complete characterization.

Q How would you characterize those agreements?

A They were agreements licensing to April Music and to Blackwood Music a substantial portion of the rights relative to the copyrights that the television network owned.

Q When you say a substantial portion of the rights, was it confined to public performance rights?

A No, I don't believe it was.

Q What other rights were included?

A I believe it included all rights other than the rights that CBS Television Network would utilize in the broadcast of -- in the making of the program or the

broadcast of the program.

Q In other words, such synchronization rights or public performance rights as might be needed by CBS Television Network for its own performances would be retained by the network under the agreement?

A No, I believe performance rights were also licensed.

THE COURT: To April?

THE WITNESS: To April and Blackwood, yes.

Q So that if CBS Television Network did not have a license from ASCAP or BMI and it wished to perform compositions which were covered by the two license agreements you have described, CBS Television Network would be required to obtain a license from April or Blackwood?

A That's my recollection.

Q Now you testified that it would be unlikely that you would wish to deal with CBS program packagers if CBS had canceled its ASCAP and BMI licenses.

THE COURT: In the present structure of the industry, isn't that right?

THE WITNESS: Yes.

Q Would you be equally unlikely to deal with CBS Television Network for the copyrights subject to these

agreements you have described?

A Well, the real question that has to be asked is whether we are talking about material that is in the existing catalog or newly created material.

Q Material in the existing catalog.

A I think with respect to any material in the existing catalog, the answers that I have previously given would apply.

Q Mr. Dean, have you ever talked to producers or packagers about the subject as to whether they were approached by publishers of music who were seeking to promote the use of their compositions on a television network program?

A Would you repeat the question?

MR. DAVIDSON: Would you read that back, please?

(Question read.)

A I really don't understand that question.

Q You testified earlier that publishers rarely if at all approached packagers of television network programs to promote the use of their programs. Is that a fair statement of your testimony?

MR. HRUSKA: I object to the form of the question, your Honor. I don't think the witness ought to be asked to recharacterize and resummarize his prior

testimony.

THE COURT: Well, I think it is perfectly fair to be sure that that is what the witness intended to say. That is all I understand Mr. Davidson to ask.

A The question previously was in terms of the steps normally taken in promotion of recordings and I said little if anything was done with television producers, and almost nothing was done with television networks, that's correct.

Q Have you ever had any conversation with a television producer or packager in which you asked whether anything was done to him or he told you that anything was done to him in that regard?

A No, I haven't discussed the subject with television packagers or producers.

Q Can you estimate what percentage of recorded compositions in the April and Blackwood catalogs have not been recorded by CBS Records?

A I would say well over 50 per cent.

Q Would you agree that all performances of music compositions and CTN enhance the value of the compositions so performed?

A Any performance enhances the value of a composition because there is a payment made with respect to the

performance.

Q Aside from the payment made in respect of the performance, would you agree with the statement that all perfo.mances of musical compositions on CTN enhance the value of the compositions performed?

A By enhancement, I could speak only in terms of significant enhancement and I would say that I could not agree with that statement.

THE COURT: I'd like to ask a question , too. was going to ask this. Isn't there ever a situation where the exposure of a song to the public can be adverse in the sense that the public doesn't like the song? Of course I understand you have to take your chance, but I am curious as to whether that ever happens. It is just a flop, in other words?

THE WITNESS: That is known as the market test.

THE COURT: Yes.

THE WITNESS: I mean there are very often situations where --

THE COURT: It must happen as it does with plays.

THE WITNESS: Which is something that we specifically track, because what we will do is try to get a record played in a particular area on a repeated basis,

and then assess the market reaction to that recording, and if we get a sufficient test and there is no sale, then we, you know, abandon that song in terms of future promotion.

That is one of the key things we aim at.

MR. DAVIDSON: Your Honor, I'd like to ask that the first two sentences of CBS' answer to Interrogatory 47 propounded by ASCAP be marked as BMI Exhibit 162 for identification.

THE COURT: There is certainly no harm in marking it for identification. I assume you are going to do something more than that?

MR. DAVIDSON: I would also like to offer it in evidence, your Honor.

THE COURT: The first two sentences of what?

MR. DAVIDSON: The answer to Interrogatory 47 propounded by ASCAP.

THE COURT: I suppose I better look at it and see if it is relevant. If it is relevant, I don't imagine any other basis for objection.

They must be long sentences.

MR. HRUSKA: They are not terribly long, but I guess I object to that answer going in evidence, your Honor, simply because I guess I now understand that answer is wrong.

THE COURT: You understand what?

MR. HRUSKA: That that answer is wrong.

THE COURT: Then you can put on a witness to indicate that it is wrong, but it stands.

MR. HRUSKA: That's right.

THE COURT: If the subject matter is relevant. I will admit it.

MR. HRUSKA: I doubt if there is any question that we said it, your Honor, but it is --

THE COURT: Subject to CBS' right on notice to counsel if you intend to put on a witness to clarify it, shall I say.

MR. HRUSKA: I don't know if it is a question of clarification. I think it is black and white.

THE COURT: Then change. Even witnesses can change their story. They have to persude the Court there is good reason for it.

MR. DAVIDSON: Your Honor, may I read those two sentences into the record at this time?

(PX162 was received in evidence.)

(Mr.Dav idson read from PX162 in evidence.)

MR. DAVIDSON: I have no further questions of Mr. Dean.

MR. HRUSKA: I guess I do, your Honor.

REDIRECT EXAMINATION

BY MR. HRUSKA:

Q Mr. Dean, I would like to show you this sentence so you can read it and reflect on it.

Let me ask you, Mr. Dean, do you agree with the substance of those two sentences?

A No, I can't agree -- I can't agree or disagree. I think that in a question asked me previously whether it enhances the value, the real question is whether there is a significant enhancement of the value, and there is certainly not a significant enhancemen tof the value of each and every composition by performance on CTN, and clearly it doesn't have an impact on performances by other ASCAP licensees in the bald way it is stated here.

This is much too simplistic an answer.

THE COURT: May I ask either for a statement by you, Mr. Hruska or I think it would be best from you, whether Mr. Dean was the source of the information contained in that answer or do you know?

MR. HRUSKA: I know in fact that Mr. Dean was not the source of that answer, simply because I don't think I had ever met Mr. Dean when that answer was made. I do not now know how that answer --

THE COURT: I don't consider this a great big issue. I don't want to spend a great deal of time on it. If we were, I would like to ask him why he said one thing one time and another thing another.

MR. HRUSKA: I know it was not Mr. Dean and I know it was not anybody from the CBS Record Division.

THE COURT: You do whatever you wish to do in regard to the inconsistency.

MR. HRUSKA: Yes, sir.

THE COURT: I don't think it is a huge matter, at least we have Mr. Dean's view.

MR. HRUSKA: Thank you, Mr. Dean. I have no further questions of Mr. Dean, your Honor. I would like, however, simply to --

THE COURT: Let's be sure. There are no further questions for Mr. Dean, is that right?

MR. TOPKIS: I have no further questions, your Honor.

THE COURT: All right, thank you, Mr. Dean.

(Witness excused.)

MR. HRUSKA: I would simply like to put a citation in the record and that is of Mr. Dean's deposition, Page 8, Lines 21 through 25, and Page 9, Lines 1 through 7.

My only purpose in doing that is because I think that reference gives the context for the question that Mr. Davidson asked regarding responsibilities. In other words, it is simply our position that had the full context of that question and those answers been brough out, the alleged inconsistency by Mr. Davidson --

THE COURT: Are we talking about this business of enhancement of music or about his responsibilities at April?

MR. HRUSKA: It was the responsibilities.

THE COURT: Mr. Hruska, I don't think that is the proper way to do it. If you want to bring out any alleged inconsistency you should have used the material you are talking about as a basis for questioning Mr. Dean when he was here.

MR. HRUSKA: I didn't think that was necessary because Mr. Dean simply answered the question,"I don't recallthat answer, " and talked about context and Mr. Davidson dropped it, but just to --

THE COURT: You want to call my attention to another part of the deposition, is that it?

MR. HRUSKA: Exactly.

MR. DAVIDSON: Your Honor, I do believe that the proper way to have done it was with Mr.Dean, and I would

object to that portion of the deposition being brought in any other way.

MR. HRUSKA: I am not offering the deposition in evidence.

THE COURT: Then I don't know what good it does. I can't just look at it if it is not in evidence. I will leave it to you if you feel it is important enough to recall Mr. Deal and ask him, but frankly I must say at this stage of the game, maybe because it was brought up unexpectedly, I don't understand of course what the inconsistency is or rather, I won't say I don't understand the inconsistency, but the importance of the inconsistency. But that will be argued, I am sure.

MR. RIFKIND: If your Honor please, our next witness is Miss Marion Preston.

M A R I O N P R E S T O N, called as a witness by the plaintiff, being first duly sworn, was examined and testified as follows:

THE COURT: Miss Preston, you have a very pleasantly modulated voice, but would you mind modulating it a little so we can all hear you.

THE WITNESS: Yes, I will. Thank you.

* * *

MR.HRUSKA: Your Honor, at this time I would like to read some passages from the deposition of Jerry Vogel, and before I do that I would like to offer into evidence Xerox pages of the original pages from the ASCAP printout of the portion of the Jerry Vogel Music Company, Inc. Catalog which is in the ASCAP Index of Performed Works.

I do this again by way of identifying the publisher.

THE COURT: What is the number of it?

(PX-883 marked for identification.)

THE COURT: I hear no objection so I will receive it in evidence.

(PX-883 received in evidence.)

THE COURT: Are your readings going to be extensive? If they are not, I don't mind your doing the reading.

MR. HRUSKA: I think I can read what I have to read in ten minutes.

THE COURT: All right.

MR. TOPKIS: Your Honor, it is our proposal to offer the balance, or I understand that the entirety of Mr. Vogel's testimony is going to become part of the record and I really think it is kind of a waste of time to try and pick and choose snippets of it.

mbg 2 "Vogel

THE COURT: If it is only going to be ten minutes, I don't consider it a waste of time. It helps me to understand the relationship of one item of evidence to another to have it brought to my attention in the proper place.

MR. HRUSKA: Would your Honor like to follow this?

THE COURT: I have a copy.

MR. HRUSKA: I start on page 3 of the transcript, line 7:

"Q Mr. Vogel, what is your present position?

"A Music publisher.

"Q You are a music publisher, you work for Tony Vogel Music Company?

"A No, I am the president.

"Q You are the president.

"Do you own an equity interest in the company?

"A I own the whole thing."

Down to line 25, bottom of the page --

MR. BLUMSTEIN: Mr. Hruska, I think if you will note that "no" has then been changed to a "yes."

You are quite right, yes. Mr. Vogel wanted the "no" in front of "I am the president" changed to "yes, I am the president."

THE COURT: I don't think it makes much difference.

MR. HRUSKA: You are right.

Down at the bottom of that page:

"Q Are you a member of any trade associations?"

(top of the next page)

"A The National Music Publishers Association.'

Page 12, beginning of line 14. I could just quickly summarize this, your Honor.

The only reason for reading this is to point out that Mr. Voegl has been in the business of music publishing for 62 years, approximately 40 of these years in the Jerry Vogel Music Publishing Company.

THE COURT: All right.

MR. HRUSKA: Page 15, line 7.

"Q But what I am getting at here is that you have these works in your catalog and I assume that they are exploited by various people in different ways; recording, sheet music, folios, things of that kind.

"What is the function of the publishing company in terms of this exploitation of your publishing company?"

"A Well, I think we are the only one that is active today the way I am.

"Q Could you describe it?

"A Well, we send out three letters a week for 52 weeks a year and they go to the music business.

"Q To whom are these letters sent?

"A They go to all the leading advertising agencies, people at the broadcasting stations, television stations, writers, producers, directors.

"Q Would these include producers of television programs?

"A Yes.

"Q And the function of these letters is to do what?

"A Ask them to please program my songs in a nice way

"Q How do you handle your mechanical licensing?

"A Through the Harry Fox Office.

"Q Do you also handle the licensing of motion picture producers through the Harry Fox Office?

"A Harry Fox Office."

I go to page 19, line 17:

"Q How would the nature of the use affect the price that you would want for the work?

"A Well, sticking to "Ballgame," that's "Take Me Out To The Ballgame" -- "if they wanted to use it in a picture there was a price of $5,000 put on it. You could use all the music you want and not the title.

"Q You mean that they could not use the title of

the song for the motion picture?

"A That's right.

"Q But they could use "Take Me Out To The Ball Game" as much as they wanted in that picture for $5,000?

"A That's right.

"Q Was there a great deal of negotiation that went on back and forth? Do you quote a price to Harry Fox and they go back to the producer and the producer says, 'No, I can't do that' and Harry Fox comes back to you and says pretty much what you told them what they could have it for and they can take it or leave it?

"A That's it."

I go to page 22, line 10:

"Q I don't recall; did you say that you sent these promotional letters to record companies as well?

"A Yes."

Page 32, line 20:

"Q What about television producers? Have you ever been in any sort of negotiations with them about performing rights?

"A No, they automatically ask for like The Daily Show would ask, they want to clear it for the next five years so you charge them a reasonable rate of dollars, $100, $200

"Q When you say clear it, clear the use of the work

"A A song from one of their shows.

"Q Is this for synchronization rights?

"A I guess you would call it synchronization. But it is on tape; remember, it is not on film."

Page 3, line 17:

"Q When you clear it for $100 or $200 for the next five years, though, that seems like a relatively low fee. Where do you get your compensation?

"A ASCAP.

"Q You get your compensation for the performing rights through ASCAP?

"A That's right."

Go to page 39, line 9:

"Q Suppose one of these movie companies came back to you and said, 'Gee, $5,000 is quite a bit of money. This is a low budget film and we really don't think we can afford that and we have got another song that we don't like as well but which we could use which would cost a little less'; would you come down in your price at all?

"A No.

"Q You would hold fast on it?

"A Yes.

"Q This seems to be a fairly firm policy of yours. Could you tell me why you stick to the price you quote?

"A Well, I thought there was only one "Melancholy Baby," there is only one "Take Me Out to the Ball Game" and there is only one "Some of these Days." I am just lucky to have three of the songs that were in the Hall of Fame.

MR. TOPKIS: You wouldn't want to read the next question and answer?

MR. HRUSKA: What is that?

MR. TOPKIS: You wouldn't want to read the next question and answer?

MR. HRUSKA: No, I will check on it.

Back to page 40, line 3:

"Q And you feel that it would be cheapening these songs if you--

"A No, I wouldn't cheapen them but I thought that the widows should take" -- "I Wonder Who's Kissing Her Now" I think is one of the greatest songs written and I think the widows of the two men who wrote the lyrics that I represent should get money."

There, you have your widows and orphans.

MR. TOPKIS: Only widows, no orphans.

MR. HRUSKA: Page 61, line 3:

"Q Suppose on January 1 of next year, 1971" - this was taken a little while ago -- "CBS cancelled its ASCAP license so that it could acquire no rights to music

mbg 8

through ASCAP and that the other two networks, ABC and [illegible] kept their ASCAP licenses so they were continuing to [illegible] through ASCAP; would you make more effort under those circumstances than you now do to solicit either the television network or the producers of its programs to use your music?

"A On what stations?

"Q On the CBS Network, which would include--

"A No, I would take them off the mailing list.

You say you have no ASCAP license?

"Q We have no ASCAP license.

"A So I have to take you off the mailing list.

"Q You would do that because they had no ASCAP license?

"A That's right, but I hope it don't happen.

"Q Would you make any effort to license them directly?

"A No.

"Q No, you would not.

"Can you tell me briefly why not?

"A I am a member of ASCAP."

Page 62:

"Q Suppose a producer of-- suppose the producer of Hawaii 5-0, which is a CBS television network program called you and said that he would like to use one of your works in one of his programs and that it would be broadcast over the CBS Network and that he would like to obtain from you a license to perform.

"He told you that normally, if CBS had kept its ASCAP license, that this would not be necessary but now that CBS has cancelled its ASCAP license, it is necessary for him to obtain the license directly from whoever is authorized to license it.

"Would you try to negotiate a deal with him?

"A I can't answer that.

"Q Because you just don't know what you would do?

"A Well, I am up a tree there. I am heartbroken that CBS went out but I can't answer that. Because it happened once before, years ago in radio, they went on strike, the three of them."

I would skip here to page 63, line 13:

"Q Suppose CBS cancelled its license today and tomorrow the producer called you?

"A I couldn't answer that. I don't think I would have to stick with ASCAP. I think most of the people would

have to stick to ASCAP.

"Q Why is that?

"A Well, we know what we got and we don't know what we are going to get.

"Q Suppose someone from CBS came to you and said, 'We would like to license' -- they make the following proposal:

"They say 'We would like to negotiate a contract with you and under this contract we would have the right to use any of the compositions in your catalog at a rate to be negotiated between us without getting prior approval and that they would remit payments in accordance with the schedule and the contract quarterly to you or, if you wish, they would remit the publisher's share to you and the writer's share among the writers in accordance with whatever figures you gave them.

"Would you be willing to at least attempt to negotiate that kind of arrangement?

"A I don't think so.

"Q Because you --

"A The writers, how can I talk for the writers? For instance, Mrs. Norton, I can't tell Mrs. Norton what to do. She is getting an income from ASCAP. Can I tell her what to do?

"Q But if CBS has cancelled its license presumably they wouldn't use any works in the ASCAP repertory unless they got the rights from the publisher or the writer.

"A Well, we got the other two networks.

"Q That's right. You would get revenues from those?

"A That's right.

"Q So you wouldn't carry on negotiations with them?

"A I couldn't answer you.

"Q Because you know what you were getting from ASCAP and you don't know what you would be getting from --

"A No. I don't want to be another Edward B. Marks Music Company. I don't want to be an outcast like he did. He joined BMI and he kept going down and down and down.

Page 67, line 17:

"Q Would it make any difference to you if CBS was willing to pay you a lump sum fee as an inducement to enter into this agreement? In other words, to assure you that you would have a certain amount of money coming in?

"A Every year?

"Q Either spread over five years or ten years or just a lump sum right at the beginning.

"A Well, a lump sum I wouldn't be interested in, in the first place, and the other I couldn't -- I don't know. We are againputting the cart before the horse.

I can't answer you.

"Q Would you be concerned about the problem of monitoring in a situation where you were not licensing through ASCAP as I have described?

"A Well, I don't think I would worry about that.

"Q You would be willing to take the reports from CBS as to what they had performed?

"A I would take it from anybody but my heart is at ASCAP right now."

Going to page 81, line 22.

"Q Do you think that the price of music would go down, the revenues of your company would go down, if CBS started dealing directly with publishers?

"A Oh, sure.

"Q Why would that happen?

"A Well, you are not using much music now in the networks and you are getting ready to have another war or something, I couldn't tellyou.

"Q But you do think the price of music would go down?

"A Yes.

"Q Would this be at all because you were doing the negotiations instead of ASCAP?

"A I think so

MR. TOPKIS: Your Honor, there are many, many portions of this deposition that we could read in the course of which the 75 year old gentleman said various things, some of them consistent with what Mr. Hruska said, some inconsistent.

If you wish, we can take the time but I wonder whether the more practical approach might not be just to print this entire testimony as part of the record at this point so that anyone picking it up will have his entire testimony.

THE COURT: That is satisfactory to me. In fact the expense is on the parties, of course, but it would be more convenient for me to have it fall right in the record.

I don't mean to say that Mr. Hruska is thereby precluded from having in the record the material that he read and places special stress on it.

I don't think we ought to quibble about those things.

MR. HRUSKA: I agree, your Honor, I was just going to suggest that we offer the entire deposition in evidence.

THE COURT: I'll leave it to the parties.

MR. HRUSKA: I do offer the entire deposition.

MR. TOPKIS: Very fine.

Could we then, your Honor, just call a couple of excerpts to your attention?

THE COURT: Of course.

Let me rule that the deposition is received in evidence in its entirety and Mr. Topkis is free to read anything that he wishes.

Sorry he didn't testify. He sounds like a powerful witness.

(PX-884 received in evidence.)

MR. TOPKIS: Perhaps we can start at page 13, line 18, where the witness was asked:

"Q Could you give us a brief description of the nature of your business, how it operates, and possibly with particular emphasis upon how it might differ from other publishing companies, such as Shapiro Bernstein or Leeds or some of the other large ones?

"A I only deal in old songs.

"Q You only deal in old songs?

"A Yes.

"Q Has that been your practice throughout?

"A I would say about 32 or 33 years.

"Q When yousay you only deal in old songs, do you mean by that that you do not acquire newly written music but rather acquire music around the time of copyright

renewal?

"A That's right.

"Q Do you usually acquire these from the author or do you usually acquire them from the heirs or --

"A Both.

"Q Is there any predominance, or is it about half and half?

"A Well, I haven't taken anything for the last 12 or 13 years. Since this new law came into effect."

MR. TOPKIS: And he was referring to the copyright extension law.

"Q What kind of promotional activities does the Jerry Vogel Music Company undertake with respect to the songs in its catalog?

"A The best in the business.

"Q Well, I am sure of that, Mr. Vogel, because from this list of songs you have I am beginning to believe what you said about the old songs are the good songs.

"A The old songs are the best."

MR. TOPKIS: Page 49, line 3:

"Q I would like to ask you the same series of questions with respect to licensing performance rights through ASCAP.

"What do you see as the advantages of licensing

couple of months that it didn't run out, in 1960, and the woman whose husband wrote the lyrics is an elderly lady today, and she is having a hard time.

"We were lucky that Julie Andrews made a Columbia record, and at that time she made a picture of Mary Poppins and she had to forget about my song and go on the songs in the picture. And that was the finish of "Don't go in the Lion's Cage."

"But I had to get another artist, good artist to pick it up and do it and I think that song is going to be a hit again. That is my opinion. And that would make her money.

"Well, now, I helped get her in ASCAP. I told her, 'Are you a member of ASCAP?' She said 'No, I didn't know anything about ASCAP.'

"So there must be others, lots of other people that don't know about ASCAP.

"Q And so you feel that if the writers are members, and apparently you feel it is in their interest to be members, then that you should be a member of ASCAP as well?

"A Yes.

"Q What other advantages do you see to being a member of ASCAP?

"A Well, it is very large now, but there was a time when it wasn't as large and they used to have a dinner every year. I think the members used to love to come to those dinners and meet their other composers, authors and composers, and shake hands. The same thing went for publishers. We met each other again and said hello and talked a few minutes , and if you are an old-time like me you like to meet those people.

"Q Any other kinds of advantages?

"A Well, the dinner was very good and then if you want some information where John Smith lives, they will tell you where John Smith lives."

MR. TOPKIS: Just a couple of bits more, your Honor. Page 59, Line 21.

"Q Did you ever have any discussions with a representative from the Minnesota Mining and Manufacturing Corporation?

"A No."

At Page 65, your Honor will recall my friend a little bit about the Edward P. Marks Music Company.

THE COURT: Right.

MR . TOPKIS: I will go on at Line 12.

"Q This was during the 1940 music strike, wasn't it? Yes. He eventually came back to ASCAP, did he?

"A Not Marks. He bought a couple of companies out and he got in through those companies. He is still with BMI.

"Q So that rather than having your works performed on CBS you would just wait and take the revenues from ABC and NBC and --"

MR. TOPKIS: Then there is colloquy.

And down at Line 20 on Page 66,

"Q Do you have any idea at this time what kinds of things you would want to know in making such a decision?

"A Well, don't forget, I am 75 years old. I don't know how long I am going to stay in New York so I don't want to jazz the thing up. So I don't want to give you an answer.

"Unless the three networks got together with ASCAP like they started BMI and this time you start the 42nd Street Company and they boycott us again."

MR. HRUSKA: There are two corrections in there.

MR. TOPKIS: They are not in my copy, sorry.

Right. The witness said "I don't know how long I am going to be alive so I don't want to jazz the thing

up."

And over on Page 67, beginning at Line 3, he said "Unless the three networks get together with ASCAP like they started BMI and this time they start another company and they boycott us again."

At Page 70, Line 3:

"Q Suppose the Court issued an injunction which prohibited ASCAP from licensing ABC, NBC and CBS?

"A I can't answer that. I don't think it will happen. I have to put it I can't answer it and I don't think it will happen.

"Q But you have no opinion as to whether -- you have no knowledge at this time as to whether you would be willing to negotiate with the CBS producer under these circumstances?

"A You want me to say something about CBS, I don't want to say anything wrong to CBS. I don't want to put in the deposition anything about CBS. I am not happy with CBS, they don't go out of their way to help me. They kick me around.

"Is that what you want me to say? I have to say that but you keep harping on CBS, CBS, and I am telling you the truth. You want me to say CBS treats me like a kig? They don't.

"Q Frank, I have no idea.

"A I know you don't. But I am tellingyou they don't do anything for me."

MR. TOPKIS: Page 74, Line 17, continuation of the question.

"Q Suppose that the Court issued an order to ASCAP which said that you shall grant CBS a license which provides that CBS shall make payments to ASCAP based upon the number of compositions which CBS uses, and the frequency with which they use those compositions; or, to put it another way, based upon the number of performance credits which are generated by CBS use.

"So no CBS has a license whereby they are paying an amount which is tied to the amount of music they use from the ASCAP pool.

"A CBS producer or an ABC producer - let's assume that ABC has the same type of license, an ABC producer comes to you and says, 'I would like to license one of the works in your catalog, in the Jerry Vogel catalog, would you quote me a price on it?' Would you be willing to quote him a price on it?"

MR. TOPKIS: The answer is at Line 19:

"A I don't thonk I can answer that. You are reaching out for sometning that isn't here yet. And I

can't answer that. As I say, I am the second witness, the third witness, and you want me to give my opinion and I am going to lay the law for ASCAP? You want me to lay the law for ASCAP? I can't lay the law for ASCAP.

MR. TOPKIS: Page 81, Line 2:

"Q Would it spoil the writer's living for CBS to deal with you --

"A I think so.

"Q You think it would reduce the revenues even further?

"A Not only the revenue, the prestige. The prestige. There is a little prestige. In other words, if a song drops dead and it never sells any more, like the Irish music is not being played any more, I think ASCAP would take care of the widow and give them something, you know, and say, well, we have got a fund for that. Your music is no good no more, don't play it on the air any more, we will give you something."

Page 83, Line 18

"Q At the present time ASCAP under the consent decree must issue CBS a per program license. Under this kind of license CBS would pay ASCAP only with respect to those programs on which it used ASCAP music which it had not licensed directly from the owners of those compositions.

"Thus there would be some programs with respect to which CBS producers, or CBS, might try to license all of the ASCAP music for the program directly.

"Under those circumstances would you be willing to negotiate with the ABC television producers for the right to license music on a program which was destined to be broadcast on CBS?

"Mr. Blumstein: I will object to the form of the question.

"A My answer is I don't think so.

"Q Can you tell me why you would not?

"A Well, I know what I have got and as I say it is just lucky that I have that extension" -- I think he referred to the copyright extension --"and I am not going to look for any trouble. At 75 I am not looking for trouble.

"Q What kind of trouble would you expect?

"A Well, I want -- if I want -- if I can continue to do what I do, I love what I am doing, if I can continue I would be very happy. And if I can't do it, I might as well close up the place, that's all. Right now I am happy the way it is going, but I hope it comes back some day."

MR. TOPKIS: I think, your Honor, that does it.

THE COURT: Very interesting, very amusing.

MR. HRUSKA: Your Honor, I think at this time we have the exhibits that were at the tag end of yesterday's testimony by Dr. Fisher.

One has already been marked as PX882 for identification, which was the exhibit he used in the first computation on the blackboard.

THE COURT: Yes.

MR. HRUSKA: Might as well do them one at a time. I offer this in evidence.

THE COURT: I take it there are no objections since it is admitted solely representing the computations of Dr. Fisher.

MR. TOPKIS: These are Professor Fisher's charts?

THE COURT: Right.

MR. TOPKIS: No. We have no objection, your Honor.

THE COURT: Received in evidence.

What about the second sheet?

MR. HRUSKA: We have not marked this and perhaps we can mark it as --

THE COURT: Call it 882A.

MR. HRUSKA: Fine, your Honor.

(PX882 was received in evidence, and

PX882A was received in evidence.)

THE COURT: I understand 882A is the showing of the second computation, is that correct?

MR. HRUSKA: Yes, your Honor. Correct.

THE COURT: Anything else?

MR. HRUSKA: There is one more, your Honor. And that is the supplemental list of Dr. Fisher's publications. What we are asking about now is the number of the original list, so we can call this --

THE COURT: What was the original number?

MR. HRUSKA: PX880. Perhaps we can mark this as PX880A.

THE COURT: Right.

MR. HRUSKA: And I offer that in evidence.

THE COURT: All right. Received.

(PX880A was received in evidence.)

* * *

Date	Page	Line(s)	Error	Change to
May 17	1800	9	Loweasten	Lowenstein
	1800	16	affair's	affairs,
	1801	10	departmet	department
	1802	22	theCBS	the CBS
	1803	7	pr sent	p sent
	1803	17	recor d	record
	1804	3, 23	jockies	jockeys
	1805	16	willtry	will try
	1806	12	WNEW and the format	WNEW the format of
	1812	10	Chappel	Chappell
	1823	6	We	May we
	1824	5	cash box,	Cash Box,
	1825	10	any	many
	1828	16-17	for Trade Press	for the trade press
	1833	12	ASCAP to BMI	ASCAP and BMI
	1838	3	evalvage	evaluate
	1838	6	stnadard	standard
	1840	4	Yhe	The
	1842	5	vague?	vague.
	1842	15	eithe	either
	1845	22	anysuch	any such

1954- 2

Date	Page	Line(s)	Error	Change to
	1845	24	COUR T	COURT
	1847	16	AGC	ABC
	1849	2	T HE	THE
	1850	7	whethe ryou	whether you
	1853	12	responsible	responsibilities
	1861	22	Dav idson	Davidson
	1863	4	we	he
	1864	19	recallthat	recall that
	1864	20	DAvidson	Davidson
	1865	9	Mr. Deal	Mr. Dean
	1870	6	whethr	whether
	1874	18	cold	could
	1876	11	produced	proud
	1877	8	mayvery	may very
	1878	9	thepublishing	the publishing
	1880	11	allright	all right
	1884	5	makd	make
	1884	11	needle-drin	needle-drop
	1886	6	Hvae	Have
	1891	7	enterrpise	enterprise
	1892	25	winds up	winds up in your files?
	1893	23	Documentmarked	Document marked
	1893	25	COUR T	COURT

Date	Page	Line(s)	Error	Change to
	1896	10	Averbach	Aberbach
	1897	5	donot	do not
	1898	22	payr oll	payroll
	1899	17	whoever	however
	1901	4	because of	in the course of
	1902	11	Arrow next	Arrow to be here next
	1902	14	shortly	surely
	1903	12	in the proceeding	for me to proceed
	1905	23	You	MR. HRUSKA: You
	1908	8	Di	Did
	1914	25	againputting	again putting
	1917	23	yousay	you say
	1921	23	a little	read a little
	1923	25	kig?	king?
	1924	2	Frank,	Frankly,
	1924	3	tellingyou	telling you
	1924	24	thonk	think
	1930	11	had interest	had an interest
	1930	20	intereted	interested
	1930	23	Ordnance	Ordinance
	1931	9	or 650	or the 650
	1931	14	Goldstein's	Goldstine's
	1931	21	Neuman	Neumann
	1932	11	callwd	called

1954- 4

Date	Page	Line(s)	Error	Change to
	1933	6	this	the
	1933	14	tital	title
	1933	24	a	delete "a"
	1934	18	fo r	for
	1935	9	Chemical.	Chemical--
	1935	21	produce	produces
	1938	22	anotherpad	another pad
	1941	16	combaination	combination
	1941	18	efficient	inefficient
	1942	3	the	my
	1942	4	by number	by your number
	1942	16	the time	the type
	1943	17	xero	zero
	1944	4	360 in	360 but they are
	1944	6	bytes,	bits
	1944	6	bits,	bits
	1944	7, 8	I	one
	1945	7, 8	I	one
	1947	2	recording	record
	1947	4	the	a
	1947	6	madeup	made up
	1950	6	high	higher
	1950	21	3400	2400

1955

ITED STATES DISTRICT COURT
OUTHERN DISTRICT OF NEW YORK

OFFICE COPY ERASABLE

OLUMBIA BROADCASTING SYSTEM	Before: HON. MORRIS E. LASKER, District Judge
vs.	
ERICAN SOCIETY OF COMPOSERS, UTHORS & PUBLISHERS, ET AL.,	69 CIVIL 5740
DEFENDANTS.	

New York, May 23, 1973

STENOGRAPHER'S MINUTES

Columbia Broadcasting System,

v. 69 Civil 5740

American Society of Composers,
Authors and Publishers, et al.,

B e f o r e:

HON. MORRIS E. LASKER,

District Judge.

May 23, 1973
10:00 a.m.

(Trial resumed.)

MR. TOPKIS: If your Honor please --

THE COURT: Yes, Mr. Topkis.

MR. TOPKIS: Before we go to Mr. Arrow to resume the cross, there is a matter involving Miss Preston that I wanted to call to your attention.

You remember that we had her direct and I was to write her a letter asking for whatever additional information I wanted.

THE COURT: Yes.

MR. TOPKIS: I did direct such a letter to her on Friday, copies, of course, to all other counsel; and

basically what I asked her for were two things:

One, she had testified that she had four sources for music used on commercials: Public domain, works specially written, and two other categories.

And I asked her could she please give us a breakdown for the year 1972 of how many came from each category; and I also asked her to produce to us, she having given us sample contracts with four or five different sources, I asked her to produce any other contracts she might have for the year 1972 with the same sources.

Now as to that second request of mine, I have received a response. It is largely in the negative, she has no others, but as to the first request, I have received a letter yesterday afternoon from Miss Preston's assistant. I gather, a Miss Laguzzi, who tells me that"Paragraph 1 of your letter requests a breakdown of the number of commercials using each of four different sources of music.

"To obtain that informationwould be a very time-consuming project as it would be necessary to search our files with respect to some 1300 commercials. We have been unable to do that within the time available."

That, of course, is the very gut I am after from Miss Preston. I want quantity and not perhaps inaccurate approximation.

So it occurs to me that I would be very largely wating her time if I brought her down this afternoon.

I'd like her at a time when she can give us the accurate information and I don't want to waste her time or your Honor's so I thought I'd speak up right now and ask your Honor's leave, perhaps, to call her and tell her we would be in touch with her.

THE COURT: That is perfectly all right with me.

I'd like to hear what Mr. Hruska has to say. But will you give me a glimmer of what use you believe you can make of this informationor what argument you can make on the basis of the possible results? In other words, how important is it?

MR. TOPKIS: Well, I think the whole commercials-in-the-can idea is a non-existent problem and I want to demonstrate that.

THE COURT: All right, I see. That is certainly to the point of one of the issues. There is no question about that.

Mr. Hruska, do you see any point in asking Miss Prston to come down until she is able to answer the questions put to her?

MR. HRUSKA: Your Honor, I must say I am a little handicapped because Mr. Rifkind has been handling this

phase of the case and I know he is planning to be in court a little later in the morning.

I can't remember offhand what the point of the search of the 1300 commercials was. What was the information?

May I ask your Honor what the information was?

THE COURT: Mr. Topkis was going to try to show, for example, 90 per cent of it is from the public domain, let's say.

MR. TOPKIS: Right, or 90 per cent is owned by J. Walter Thompson; I don't know

THE COURT: It does create a problem.

MR. HRUSKA: It may well be, your Honor, that Miss Preston is in a position to give estimates that might be as adequate as a search of 1300 files. I don't know.

THE COURT: The impression I get is that that is unlikely; although I must say it is more by osmosis than anything else .

And, secondly, for something that is as significant a matter to CBS, itself, I think that we ought to have hard facts; so I agree with Mr. Topkis there.

As a matter of fact, if he proves that the commercials in a can is not a problem, he is doing you a favor,

in a sense.

We will see what he comes up with.

Now, do you want to call her or have somebody call her now?

MR. TOPKIS: I will do so, your Honor, and tell her we do want the information as soon as she can get it for us.

THE COURT: All right.

MR. TOPKIS: We will put her on when she has it.

THE COURT: I assume if J. Walter Thompson sends Paul Weiss a bill for the labor involved, Paul Weiss will pay for it. That is your worry.

MR. TOPKIS: Mr.Korman is telling me he will send it somewhere else. I am not sure where. But, yes, we will handle that problem.

MR. HRUSKA: Am I correct in assuming that this is information which is not recorded in the ASCAP data processing system?

MR. TOPKOS: It is nowhere near the ASCAP data processing system.

MR. HRUSKA: This would be the source of licenses for music used.

THE COURT: No, not the source of licenses. I understand he wants to know the nature of the music

used."

MR. TOPKIS: Right.

For commercials by J. Walter Thompson for the year 1972 as between the various sources which she indicated.

MR. HRUSKA: Your Honor, I don't want to belabor this but I had been under the impression that logs or cue sheets were furnished by the advertising agencies to ASCAP, and that ASCAP did record in its own data processing.

THE COURT: Mr. Topkis seems to think not.

I assume if he had the information and thought it was --

MR. TOPKIS: If we could get it easy, we'd get it easy, I assure you.

THE COURT: All right, then.

MR. TOPKIS: Now, your Honor, I suppose we can go to Mr. Arrow.

THE COURT: All right.

Mr. Arrow, will you resume, please?

Will you give Miss Preston a call shortly after lunch or some time around there so we can keep in touch with the situation and try to make some plan as to when she will be able to get down here.

ALLEN H. ARROW, resumed:

CROSS-EXAMINATION

BY MR. TOPKIS:

Q Mr. Arrow, you testified on your direct examination, I believe, that Mr. Sal Chiantia spoke to other publishers in order to answer their questions and generally to help in your effort in obtaining license arrangements with them on behalf of 3M, is that correct?

A Yes.

Q Would it be accurate to say that Mr. Chiantia was the most helpful person to you in persuading other publishers to license the M700 for 3M?

A It is difficult to say who was the most helpful. I would certainly say he was one of the most helpful.

Q All right.

To your knowledge,was Mr. Chiantia subsequently elected a director of ASCAP?

A I understand he was.

Q To your knowledge, was he subsequently elected, what is called a publisher vice president of ASCAP?

A I don't know.

THE COURT: For continuity, can Iknow whether Mr. Hruska agrees with that, I take it he was elected to the latter capacity, is that correct?

MR. RRUSKA: I believe he stated in his deposition he is a vice president of ASCAP, your Honor.

I assume that occurred after this time period.

THE COURT: Thank you.

MR. TOPKIS: Thank you, your Honor.

Q Mr. Arrow, you testified on your direct examination as to some publishers, ASCAP members, with whom you did not enter into license agreements relating to the first series of the M700 tapes.

Do you recall that testimony?

A Yes.

Q Now I'd like to ask you, sir, questions about publishers with whom you did enter into agreements and I will state for the record that we have served a subpoena upon Mr. Arrow and obtained certain of his file documents.

Did you enter into a license agreement with a publisher known as Ahlert-Burke Corporation?

A Yes.

MR. TOPKIS: I will offer, your Honor, the document which has been marked for identification as AX 194, and it was -- we will ask this now be marked.

I'm sorry, it has previously been marked as PX 504 for identification.

I will offer that in evidence.

THE COURT: Any objection?

MR. BAKER: No objection.

(AX 194 received in evidence.)

THE COURT: Do you care to comment, Mr. Topkis, as to what the significance of any particular license is?

MR. TOPKIS: No, your Honor, my comments will be as to the bulk of them.

If any particular ones call for comment I will comment at that time, your Honor.

THE COURT: The reason I ask is because I wonder whether we need to put them all into evidence or merely establish that they were granted and then put a form in, if you wish, or if there is any special one that has any particular significance.

MR. TOPKIS: Perhaps it would be desirable not to burden the record.

I can go through them with Mr. Arrow.

THE COURT: Certainly, I am interested to know how many there were. I don't need to look at them.

MR. TOPKIS: Right.

Q Mr. Arrow, let me read you some names and if you will just tell me whether you entered into a license agreement with these ASCAP publishers for the first series of M700 tapes.

I have already asked you about Ahlert-Burke.

I will ask you about Barton Music.

A I don't recall whether the Barton contract was for the first or second series but there was a contract with Barton Music.

Q I will show you PX 597 for identification and ask you whether that refreshes your recollection.

A I believe this was for the first series.

MR. TOPKIS: Your Honor, it occurs to me that I am going to want the dates of these documents as well as the fact of their having been made, so perhaps what I might do, both to expedite our proceeding and also to make the record complete, would be to offer them all in one bunch.

I will state for the record now that I am doing so, and I will ask the witness to identify them.

Since they come from his files there should be no problem.

THE COURT: All right.

Q Mr. Arrow, I am going to show you documents AX 395 for identification, that you have in front of you; a document received in evidence already as 3M PX 56.

That related to the Bourne Company. Do you remember entering into that contract?

A Yes.

Q There was another one with Brandom Music Music Company, PX 590 for identification.

A Yes, I remember this one.

Q And there was one with Chippendale Music, Inc., which we have marked as AX 198 for identification, Brandom being marked as 191 for identification.

A Excuse me, are you asking me whether the Chippendale contract was a first series contract or are you asking me whether we had an agreement?

Q First series, sir.

A I believe it was the second series.

Q Second series, all right, fine.

Q And Compton Music Corporation, and we will show you what was formerly marked as PX 587 for identification but we will now mark as AX 199 for identification.

A Yes, this was a first series agreement.

MR. HRUSKA: What was the number of that again?

MR. TOPKIS: Compton, the number formerly PX 587 for identification and we will mark it now as AX 199.

Q I show you now two agreements relating to Consolidated Music Publishers, Inc., Mr. Arrow. They have been marked-- one of them has already been received in evidence as 3M PX 24, and the other is now marked as PX 584

for identification, and we will give it the number AX 201 for identification.

Are these two agreements which you entered into with Consolidated?

A Yes, these were for the first series.

Mr. Topkis, I think I answered you earlier with respect to Barton Music that it was a first series contract.

I don't have any specific recollection of the date but the date on the agreement as I read it is unclear. It appears to be 23rd, August 1966, which would make it second series.

Q Fine, thank you for the correction.

Since we are gong to both first and second series, let's go back to the first one which was Fred Ahlert Music Corporation.

There we have a document formerly marked PX 593 for identification which we would now like to mark as AX 193.

That I believe relates to the second series, is that right?

A Yes, I think it is the second series.

Q That is an agreement which you signed with that ASCAP publisher?

A I did not sign. It was signed on behalf of 3M.

Q Next, Criterion Music Corporation, we have already received in evidence, 3M PX 59, I believe.

And next I will ask you about a publisher called Four Jays Music Company, and show you what we will mark as AX 203 for identification.

Is that an agreement which you entered into with that company or 3M entered into?

A Yes.

Q And Frank Music Corp.

You testified last week about your negotiations with Frank relating to the first series of tapes.

You actually did make an agreement with them as to the second series, did you not, sir, and I show you what was formerly 3M PX 192 for identification and what we will now mark as AX 204 for identification.

A Is your question did 3M enter into an agreement with Frank?

Q That's right, sir.

A Yes.

Q Thank you.

THE COURT: I don't doubt the accuracy of the information but as a matter of curiosity, were you personally involved in each one of these licensing arrangements

or contracts?

THE WITNESS: I was personally involved at least to the extent of preparing and overseeing the preparation of the agreements.

In some instances I was the active negotiator. In some instances I was given information by Mr. Lindgren with respect to a negotiation he had concluded.

THE COURT: I see.

Q Now, sir, there is a company called Hillside Music. We will hhow you there a document marked AX 221 for identification.

Did you enter into a contract with that publishing company?

MR. TOPKIS: All right, we will pass that one for the moment.

Q Holloway Music Publishers, Inc.

We will show you a document that formerly was PX 592 for identification, and we are now marking it as AX 205 for identification.

Did 3M enter into that agreement?

A Yes.

Q Next here we come to a couple you have already seen. You entered into an agreement with Jewel Music Publishing Co., Inc., which has been marked 3M PX 32, is

that correct?

A I don't know how it was marked but 3M did enter into an agreement with Jewel.

Q Very well.

And you also entered into an agreement with Joy Music Inc. which we have marked as 3M PX 57.

A 3M did enter into an agreement with Joy Music, yes.

Q International Korwin Corp., showing you the document, which we have marked as AX 208 for identification, I ask you whether that is an agreement that 3M entered into with that ASCAP publisher?

A Yes, 3M did enter into this agreement.

Q Leeds Music Corp. you testified about.

That is Mr. Chiantia's organization. 3M PX 52.

Mills Music, Inc., showing you a document that was formerly PX 596 for identification and it is now marked AX 210 for identification.

I ask you if that is a copy of an agreement that 3M entered into with Mills Music?

A Yes, sir.

Q And Pic Corp., showing you a document formerly marked as PX 585 for identification, now AX 211 for identification; I ask you whether that is an agreement that 3M

entered into with Pic Corp., another ASCAP publisher?

A Yes, it appears to be.

Q And Raye Music Company, showing you a document we have marked as AX 212 for identification. I will ask you whether that is an agreement that 3M entered into with that publisher?

A Yes, it is.

Q Now an organization called Ross Jungnickel,Inc.; I will show you a document formerly marked as PX 589 for identification, now being marked as AX 213 for identification, and ask you whether that is an ASCAP publisher with which you entered into an agreement or 3M entered into an agreement?

A Are you asking me whether 3M entered into an agreement with Ross Jungnickel or whether this is the agreement?

Q Both, really.

A I can't -- the copy is almost illegible, but I would testify that 3M did have an agreement with Ross Jungnickel.

Q Mr. Arrow, I think that is the copy that was produced at your deposition or perhaps it is a copy of a copy. In these days of Xerography to the umpteenth generation, we begin to lose legibility.

But there was such an agreement, right?

A There was such an agreement. You might use a

3M copying machine.

Q You also had an agreement, am I correct, with St. Nicholas Music, Inc., and we will show you AX 214 for identification, and ask you whether that is a copy of that agreement?

A Yes, it is.

Q Another ASCAP publisher, Sam Fox Publishing Co., Inc., we will show you a document formerly PX 1A for identification, now being marked AX 215 for identification, and ask you whether that is a copy of an agreement between Sam Fox and 3M?

A Yes, it is.

Q Next, Southern Music Publishing Co., Inc., Mr. Arrow, we will show you a document which we will mark as AX 216 for identification.

Pass that for just a moment.

Shapiro Bernstein, I think you testified the other day that you entered into an agreement with Shapiro Bernstein relating to the first series, is that correct, Mr. Arrow?

A Yes, it is correct.

Q And we marked 3M PX 50 in connection with that.

Now let's go, if I may, to Valando Music Corp. and Laurel Music Corp.

Am I correct in understanding that AX 219 for identification is a copy of an agreement which 3M entered into with those two ASCAP publishers?

A Yes.

Q Now, Mr. Arrow, we have subpoenaed from you a number of additional contracts, and I understand that you have been good enough to produce them in court.

Specifically, I am referring to agreements with Amor, Hillside, Southern Music and Valeda Music and Wayne Music; do you have copies of those documents with you, sir?

A With the following corrections: I assumed that by Valeda you meant Valando. I don't recall any company called Valeda.

Q I am sure you are right.

A And there was never any agreement with Wayne.

Q So that we do have agreements with Amor, with Hillside, with Southern and Valando, is that correct, sir?

A Yes.

Q And we will assign to them, if we may, to the contract with Amor the number AX 220 for identification, to the agreement with Hillside the No. AX 221 for identification, to the agreement with Southern the number AX 216 for identification, and to the agreement with Valando, the

No. AX 218 for identification.

MR. TOPKIS: I would like at this point, your Honor, to offer in evidence all of the documents which Mr. Arrow has identified.

THE COURT: I assume there is nc objection.

MR. HRUSKA: For one thing, I don't think we have the last documents that Mr. Topkis mentioned that had been subpoenaed from Mr. Arrow.

MR. BAKER: I have never seen them and many of the other documents I have not looked at for some time.

THE COURT: Unless something that I cannot imagine at the moment is brought to my attention, they seem to be admissible.

You can check them during the break or at lunch.

Some of them may have to be re-marked. The clerk is not in the court at the moment and arrangements will have to be made.

Mr. Topkis, I take it you will arrange with the clerk of the court to do whatever actual marking is required.

MR. TOPKIS: Of course, your Honor.

Q Mr. Arrow, that takes us through the agreements that you did make. Most of those agreements were with reference to the first series of your tapes, is that right?

A I don't know by actual count.

Q Can you tell us this then, sir: When were the first tapes negotiated and when were the second tapes negotiated?

A I think we began negotiating for the first series of tapes at a time previously discussed, October, November and December of 1964, continuing into the spring of 1965, and then I believe immediately thereafter we began to negotiate with other publishers for a second series program.

I would think that we concluded negotiations with respect to the second series around the early part of 1966.

Q Would there be any cut-off date that we could use to distinguish between first series agreements and second series agreements?

A Well, the first series recordings were concluded by June 1, 1965. While we might still have had a couple of bits and pieces to tie up, I think it is a fair assessment that negotiations were terminated for the first series as of that date.

Q Although possibly a contract or two or three may have been signed later?

A There may have been some loose ends to be tied

up, yes.

THE COURT: Was the second series different in that it covered different songs basically? What were the major differences between the second and the first series?

THE WITNESS: The major difference was that the repertoire of song titles was entirely different.

THE COURT: And, of course, it did cover a different time period, too?

THE WITNESS: No, sir.

THE COURT: It did not?

THE WITNESS: No.

Q Mr. Arrow, the first series of agreements that you signed were for three-year terms, is that correct?

A Do you mean a three-year term of performance rights?

Q Right, sir.

A Yes.

Q Did you obtain renewals of those contracts from the publishers involved?

A For the most part, yes.

Q Have you obtained renewals seriatim since that time?

A Yes.

Q Was that true also of the publishers with whom

you dealt with reference to the second series?

A Yes.

Q Mr. Arrow, am I right in understanding that the 700 machine which you thus obtained performing rights licenses for from publishers directly was one of the most extraordinary successes in the history of 3M?

A I don't think so.

Q I understand that it was one of the rare ventures to go into the black in its first year. Is that correct?

A That is correct.

Q Has it been 3M's happy experience that the bulk of its ventures go into the black that fast?

A No, but that wasn't your question.

Q All right. In any event, it was a tremendous success?

A It was a success, yes.

THE COURT: You say that 3M has been relatively successful in securing renewals of the licenses it received on the first and second series.

Is it still selling machines under those licenses or have those licenses been superseded by the arrangements that have been made with ASCAP?

THE WITNESS: No, sir, they have not been superseded. The license which we presently have from ASCAP

covers machinery which is to be leased and the 700 is to be sold. 3M is still selling 700 machines and still leasing 1200 machines.

THE COURT: Thank you.

Q Your ASCAP license related to the 1200 machine, is that right?

A That's right.

Q Has the 1200 machine been as successful as the 700 machine?

A No.

Q Mr. Arrow, I would now like to turn our attention to some of the publishers about whom you testified the other day where youydidn't wind up making the deal at least the first time around.

You spoke of some negotiations with Irving Berlin Music. You remember that?

A Yes.

Q And I think you testified that Berlin was represented by a lawyer named Ted Jackson, is that right?

A Yes.

Q Was it your impression that Berlin was favorably inclined to the idea of licensing 3M directly?

THE COURT: You mean him personally or the company?

MR. TOPKIS: The company.

A At first my impression was that the company, at least, was favorably inclined, and I guess I would have to put the company and Mr. Berlin in the same context. I think Mr. Berlin was the company.

Subsequently--

THE COURT: That impression did not come to you from personal discussions with him, did it?

THE WITNESS: No. Only from discussions with Mr. Jackson.

MR. HRUSKA: I move to strike the testimony, your Honor.

THE COURT: Strike what?

MR. HRUSKA: I move to strike Mr. Arrow's last answer.

THE COURT: I will strike the part of it that refers to Mr. Berlin personally, although he is only giving his own personal reaction.

Mr. Arrow did have Mr. Arrow's personal reaction.

This is evidence to me only that Mr. Arrow thought that Mr. Berlin might be interested.

MR. HRUSKA: I believe on the direct examination of Mr. Arrow there were some rulings as to impressions.

MR. TOPKIS: Will you keep your voice up, please.

Mr. Hruska?

MR. HRUSKA: I believe that on the direct examination of Mr. Arrow there were some rulings with respect to testimony concerning impressions as opposed to testimony concerning statements made to Mr. Arrow.

THE COURT: You didn't object to the question and the question was about impressions.

MR.HRUSKA: I'm sorry. I didn't hear that. I thought the question was what was the reaction of Mr. Berlin and the answer came in terms of impressions.

THE COURT: I will sustain the objection to the question of impressions unless Mr. Topkis indicates why Mr. Arrow's state of mind is relevant.

MR. TOPKIS: I wouldn't suggest that it was, your Honor.

Q Let me go directly to the fact, Mr. Arrow.

Is it the fact that you were unable to enter into a license agreement with Irving Berlin Company because you were unable to agree on the number of compositions which 3M would have been required to use?

A That is the reason which was told to me.

Q And Mr. Jackson, who represented the Irving Berlin Company in these negotiations, also represented Bourne Publishing Company, did he not?

A Yes, he did.

Q And on behalf of Bourne he negotiated an agreement with you which Bourne signed, is that right?

A Ne negotiated the contract language. He did not negotiate the agreement in broad terms.

Q But Bourne did sign the agreement?

A Yes.

Q You testified also, I think, Mr. Arrow, about your negotiations with reference to the first series of tapes with Frank Music, where you were unable to reach an agreement, but Frank did make a deal with you in 1966 for the second saries of 700 tapes, didn't he?

A Yes.

Q Did Mr. Kramer at the time of negotiating the Frank Music contract relating to the second series of tapes say in words or substance to you that he had decided to enter into a contract because he say other people making money and wanted to get some of it for himself?

THE COURT: Did who say that?

MR. TOPKIS: Mr. Kramer on behalf of Frank.

A I think if you reverse the positions, that is probably what he agreed was the case. I don't think he stated it that way. I think I reminded him that Frank Music Corp. had turned down the agreement in the first

instance and thought that perhaps they should reconsider and Mr.Kramer agreed to reconsider and subsequently entered into an agreement.

Q Now let's go to Famous Music.

You testified on your direct examination, Mr. Arrow, that you had some negotiations with Mr. Israel and Mr. Timberlake and Mr. Herman in 1964 and you were unable to make a deal, right?

A Right.

Q In 1966, however, you had some further talks with Mr. Sid Herman of Famous Music, did you not?

A Yes.

Q And a draft agreement was prepared between 3M and Famous and approved by Famous, isn't that right?

A I think so, yes.

Q And at that point you decided on behalf of 3M not to conclude the agreement with Famous because 3M had no need for an additional repertoire, is that right?

A Not quite accurate.

Q Will you correct me, please, sir?

A At that time we determined not to go into the agreement with Famous because we believed we were going to conclude an agreement with ASCAP.

Q In any event, in 1966 Famous was quite willing

to enter into an agreement with you, is that right?

A Yes.

Q I think I may have misspoken myself.

I think it was 1967 actually.

A I don't recall the date specifically, but I do recall the reason we never consummated the agreement.

Q Let me ask you about this specific point. It was your decision not to make the agreement, not Famous', right?

A Yes.

Q At your deposition, Mr. Arrow, you were asked this question and gave this answer, and I don't think it is of any great importance, but let me read it to you.

All I have to do is read your answer from page 218, line 23.

You said:

"If you are asking me whether as of" --

MR. HRUSKA: Your Honor, I object to this. Even tough this is cross-examination, I think the rule is that in examining the witness, a third party witness, the testimony must be in conflict with a portion of the deposition before the deposition can be used.

THE COURT: What is your purpose in doing this, to try to show an inconsistency?

MR. TOPKIS: Yes, your Honor.

THE COURT: All right, if you are trying to show an inconsistency.

MR. HRUSKA: Inconsistency between the last testimony and this deposition?

MR. TOPKIS: That is right.

MR. HRUSKA: There again, your Honor, I believe we should adopt the ground rule of showing the witness the page of the deposition and having him look at it and reconciling it.

THE COURT: I thought I already ruled on that before, Mr. Hruska, that I didn't intend to cut down the right of anybody to cross-examine when I made the rule that I did with regard to reconciling apparent inconsistencies when somebody was on direct. I was broadening the rights of those who were conducting the direct examination.

Q You gave this answer, Mr. Arrow, and I am skipping the question because the question is a little confused. You answered: "If you are asking me whether, as of September 8, 1967, Famous Music was making the same objection, the answer is obviously not. The reason we didn't enter

into an agreement with Famous in 1967 is that we had no need for their repertoire."

As I say, I am not making the issue of credibilit y, just trying to get the record as straight as we can.

A I am not sure that they are completely inconsistent, Mr. Topkis. We were about to obtain access to the ASCAP repertoir e from ASCAP, so I suppose it is fair to say that we had no need of the Famous Repertoire through a separate license from Famous. We did subsequently include as much of the Famous repertoire as we could in the 1200 series, because 3M did feel an obligation to use it in view of the fact that we had just about entered into an agreement.

Q Isn't it the fact that you were thinking of an agreement with Famous in 1967 in connection not with the 1200 series but with the 700 series, for which you never made a deal with ASCAP?

A I believe we were thinking about it in connectio with whatever pr ograms 3M had. I don't recall at this time whether we are presently using the Famous repertoire in the 700 series or just the 1200. I have an impression that we are using it in both.

Q Let me show you 3M PX21 for identification, Mr. Arrow, and ask you whether that casts some light on the situation.

A On which situation?

Q Well, really I am a little in the dark, and I am trying to find out. What were you trying to do with Famous or what were you thinking of doing with Famous?

A At which time, Mr. Topkis?

Q At the time of that letter, September 8, 1967.

A Well, at this time Mr. Herman called me to find out whether there was any room in the 3M tapes for the Famous and Paramount repertoire, and there would have been room had 3M decided to record a third series of tapes. I wasn't sure whether Mr. Lindgren had that in mind or not, and I wrote to him to tell him that Famous and Paramount libraries were apparently going to become available.

Q But nothing came of it? I don't mean to press the point unduly.

A Well, at some time we entered into new negotiations with Famous and Paramount. I think at that time some of their executives had changed, and we did agree -- I am not sure how the dates mesh -- but we did agree with Famous and Paramount and did send them a draft agreement

which was then never executed by 3M because of the change of the situation with ASCAP.

Q I see. All right. Now, may I ask you a further question inspired by the document you are holding in your hand. There is a reference in the last paragraph to the availability of the Irving Berlin catalog. Do you see that, sir?

A Yes.

Q Could you explain that to us? Had there been some talks with Berlin or what?

THE COURT: Is this a letter from you to Mr. Lindgren?

THE WITNESS: Yes, sir.

A Yes, we had had conversations with not Irving Berlin, bu twith Ted Jackson at that time about the availability of the Berlin catalog.

Q And Mr. Jackson had indicated to you that the Berlin catalog would be available?

A Yes, he indicated to me that he thought that we could make an agreement with Irving Berlin along reasonable lines.

Q Do I understand then that you decided not to go forward with those negotiations for the same reason that you decided not to go forward with the discussions with Famous?

A You mean negotiations with Irving Berlin?

Q Right.

A Yes.

Q You testified concerning Music Publishers holding company, MPHC, I think it is called in the trade, the Warner's publishing company. Do you remember that testimony sir?

A Yes.

Q And you told us, as I recall it, that you had a meeting with a Mr. Lee and Mr. Lee said that he would recommend the proposal to Mr. Herman Starr, is that right, sir?

A Yes.

Q I think you testified further that it was reported to you by Mr. Lee that Mr. Starr was considering the matter favorably, but Mr.Starr became ill and ultimately died and the matter was never resolved, is that correct?

A T he matter was never resolved at that time, yes.

Q Actually, subsequently, sir, you reached a verbal agreement with MPHC, isn't that right?

A Yes, I think subsequently we did.

Q And it was 3M's decision that caused that verbal

agreement not to ripen into a firm agreement, is that not correct?

A I believe so, yes.

Q You testified also about some discussions with I think it was Mr. Allen Schulman on behalf of the Richmond organization. Do you remember that testimony?

A Yes.

Q I think the thrust of the testimony was that you were unable to agree on terms?

A That's correct.

Q Subsequently, and specifically on or about December 20, 1965, did you receive or did your partner Mr. Chrenstein receive a letter from Mr. Richmond of the Richmond organization, of which I show you a copy, AX185 for identification.

A I have seen this letter, yes. I assume it was received by my partner.

MR. HRUSKA: There is another number too.

MR. TOPKIS: It was formerly 3M PX48 for identification, and I offer it in evidence, your Honor.

MR. HRUSKA: No objection, your Honor.

THE COURT: All right, received. What exhibit number now?

MR. TOPKIS: It is now AX185 received in evidence.

Q Mr. Arrow, subsequent to the receipt of this letter, AX185, you didn't offer any proposal to Mr. Richmond, did you, or 3M didn't?

A You mean immediately subsequent? Do you mean immediately subsequent?

Q That's right, sir.

A Immediately subsequent I don't recall. At some time we did have additional discussions.

Q Did those discussions ripen into an agreement?

A No.

Q Was that by reason of 3M's decision?

A Well, the number of compositions which the Richmond organization seemed to feel we had to include in the program was regarded by 3M as being totally unrealistic, so if you mean that it is 3M's decision not to accept Mr. Richmond's terms, yes.

Q Very well.

THE COURT: It wasn't because of the ASCAP license?

THE WITNESS: Not at that time, your Honor.

Q You testified about some conversations that you had with Mr. Bregman, of the firm of Bregman, Vacco & Conn. Do you remember that testimony, Mr. Arrow?

A Yes.

Q On the basis of your experience, you told Mr. Bregman, did you not, that his attitude with respect to direct licensing by 3M did not represent the overall view of the music publishing industry, is that right?

A I think that's what I told him, yes, or at least that was the impression I had. I am not sure whether I told him.

Q You testified, I think, on direct, that Mr. Leon Brettler told you that by reason of his signing on behalf of Shapiro-Bernstein with 3M, he had been regarded by somebody or other as a bad boy. Do you remember that testimony?

A Yes.

Q Mr. Brettler signed with you again and again and again, isn't that right, or Shapiro-Bernstein did?

A Again and again and again?

Q Yes, sir, three renewals. The original and two renewals.

A If that is what the files indicate, I suppose I signed them.

Q Going back to Frank Music for just a second, Mr. Arrow, do I understand that when discussions were renewed, the discussions that ultimately resulted in your

obtaining a license for Frank with reference to the second series of tapes, they were renewed at the initiative not of 3M, but of Frank?

A I don't recall.

Q Let me see if I can refresh your recollection, sir, by reading to you from your deposition at Page 266, Line 18:

"Q What did you say to Mr. Kramer to convince him to contract with 3M after December 28, 1965" -- and you answered "I don't think I said very much to him at all. By that time it had become apparent that the publishers who had licensed 3M to engage in the 700 project were making a lot of money, and I believe Mr. Kramer called me and suggested to me that perhaps Frank was misguided in failing to enter into an agreement with 3M in the first instance, and wanted to know what the possibilities were to turn the clock back and try to make a contract with 3M."

Does that refresh your recollection, sir, that that is the way it happened?

A I believe it did happen that way, yes.

Q You spoke of there having been a change in the management of one of the companies with which you dealt. Actually there had been a number of changes in the years since you had your talks, first talks with reference to

direct licensing by 3M, am I not correct? Specifically, I have reference to my understanding that Mr. Bregman has died.

A I understand he is dead, yes.

Q And Mr. Arthur Israel has died?

A Yes.

Q And Mr. Ricketts has died?

A Yes.

Q And Mr. Herman Starr has died?

A Yes.

Q And Mr. Dreyfus has died?

A Mr.?

Q Both Max and Louis.

THE COURT: Dreyfus.

A Dreyfus, yes.

Q Dreyfus, yes, sir. And I think Mr. Timberlake has retired?

A I don't know.

Q And Mr. Arnold Maxin no longer works for the Big 3, does he?

A No.

Q Mr. Arrow, when you sold your first group of the 700 machines, you being 3M, of course, you sold with those machines a 3-year performing rights license for the tapes

sold with them, right?

A Yes.

Q When you obtained renewals from the publishers of their original license agreements with you, those renewals operated to license new machines but not to continue the licenses of the old machines, is that correct?

A That would be correct unless the purchasers of the old machines had acquired additional tapes.

Q Referring to the purchaser of an old machine, three years after he purchased that machine, he no longer had a license right?

A Unless he had acquired additional tapes.

Q Right. But referring to the old tapes he didn't have a license to go on performing those publicly for profit?

A In the absence of anything else the answer would be yes, he did not.

Q According to your understanding, did any of the original purchasers of 3M 700 machines obtain licenses for the old tapes when their original three-year licenses expired?

A Yes, they did.

Q To any degree?

A Yes, to some degree.

Q Can you quantify that, sir?

A It is very difficult to do it, Mr. Topkis, because I don't have information on how many of the old tapes are still in use, but my understanding is that approximately a third of the original purchasers have renewed their performing rights license.

THE COURT: How did they go about it? How did they do it?

THE WITNESS: Do you want a narrative?

THE COURT: Well, I'd like an example. I don't know whether it requires a narrative or what.

THE WITNESS: Well, 3M contracted with the publishers from whom they had originally obtained licenses under terms whereby 3M was able to offer to the original purchasers an extension and to collect a fee from these original purchasers for the continued use of tapes, and 3M passed a portion of that fee onto the proprietors of copyrights.

THE COURT: It was running a mini-ASCAP operation?

THE WITNESS: A mini-ASCAP, yes.

Q Mr. Arrow, we seem to have turned up two other

license agreements between 3M and publishers, and I will show you first what we have marked tentatively as AX222 for identification. The publisher is Hi-Ti Music Corporation. Did you enter into or did 3M enter into an agreement with Hi-Ti and is that document a copy of that agreement?

A I believe 3M entered into several agreements with Hi-Ti, this is a copy of one of the agreements.

Q Very well, sir. I will show you AX223 o for identification which appears to be an agreement dated November 5, 1965, between 3M and Milene Music, Inc., and I will ask you whether that is a copy of an agreement such as I have described?

A Yes, it is.

MR. TOPKIS: I offer them both in evidence, your Honor.

THE COURT: Show them to Mr. Hruska, please.

MR. BAKER: No objection, your Honor.

THE COURT : All right, received without objection.

MR. TOPKIS: We have no further questions. Thank you, Mr. Arrow.

(Exhibits AX222 and AX223 were received in evidence.)

MISS KEARSE: I have no questions of Mr. Arrow.

MR. BAKER: Your Honor, could we have about ten

minutes?

THE COURT: Let's take a morning recess at this time.

REDIRECT EXAMINATION

BY MR. BAKER:

Q Mr. Arrow, you were having some difficulty earlier in recalling the date around which you reached a tentative agreement with Paramount-Famous regarding licensing of the subsequent series of tapes. I would like to show you 3M PX152 which is a letter from you to Mr. Herman dated December 29, 1967, and ask you if this refreshes your recollection as to the approximate date.

A Yes.

Q What was that date?

A The date of this letter was December 29, 1967.

THE COURT: You are trying to bring to my attention the date of something besides the date of the letter, I assume.

MR. BAKER: Yes, your Honor, I am trying to bring to your attention the date at which they reached the tentative agreement with Paramount-Famous which was referred to earlier, for a subsequent series of tapes.

THE COURT: Is the date of the tentative agreement the same date as the letter, approximately?

THE WITNESS: Probably some time before.

Q Earlier Mr. Topkis asked you a two-part question. The first part related to whether you ever told -- were told that Herman Starr was considering the 3M proposal favorably with respect to licensing the first series of the M700 cartridge. I think the letter is a little ambiguous as to whether that statement was ever made to you. Were you ever told that Mr. Starr was considering the 3M M700 proposal favorably?

A I think I was told that he was considering it.

Q With no indication as to his attitude toward it?

A The indication was, as well as I can recall, that he was not negative, but I don't recall the word "favorable," being using.

Q Do you recall approximately when the verbal agreement with MPHC was reached with respect to a subsequent series on the M700 cartridge?

A I think it was probably in late 1967.

THE COURT: This was a verbal agreement?

MR. BAKER: He testified earlier they had reached a sort of verbal understanding.

THE COURT: I see.

Q Mr. Arrow, you also testified I believe that Mr. Brettler had signed renewal agreements for performance

rights with respect to the M700. I believe Mr. Topkis stated, "Didn't he sign it again and again and again."

Was ASCAP licensing performance rights to the M700 at that time?

A No.

THE COURT: Can I nail tha t down a little bit more? I thought I unders tood from the testimony on cross-examination that in regar d -- this is Shapiro-Bernstein, isn't it, Brettler?

MR. BAKER: That is correct, your Honor.

THE COURT: In that case, not necessarily unique, but one of those who had consistently renewed, and was still licensed by BM; is that correct?

THE WITNESS: Yes, sir. To clarify the position further, ASCAP has never licensed any rights with respect to the 700.

T HE COURT: I understand t ht now, but there was some u ncertainty as the result of the last question by Mr. Baker as to whether he was trying to emphasize the particular period or whether ASCAP had entered into whatever license agreement it has entered into, and as I understand the situation now, what it amounts to is that Shapiro-Bernstein, for example, entered into a licensing

agreement with 3M before ASCAP entered into any agreement with 3M, and has continued under the 3M license to do the M700 project ever since, even though ASCAP has since that time entered into an agreement with 3M which governs the M1200.

Is that right?

THE WITNESS: Yes, sir.

THE COURT: Thank you.

BY MR. BAKER:

Q Very briefly, there was some discussion of the differences between the M700 and the M1200.

Was the M1200 -- you said that that was a lease program, is that correct?

A That is correct.

Q Was the M1200 designed primarily for a different type of market than the M700?

A Probably not, although it may have worked out that way.

Q Would you describe the way it worked out?

A Well, the 1200 is really a modification of the 700 with a larger capacity. So you might say that it is designed for larger establishments. But whether you would characterize it as a different kind of market or not I just don't know.

It has worked out that the 3M 1200 has only been used for leased programs.

Q You were asked about a number of publishers this morning with whom 3M did make arrangements. Among those was Consolidated Dorsey Brothers, Hi-ti, Holloway, Joy and Pic.

There was some earlier testimony concerning the relative importance of publishers to 3M.

Can you tell me how those five publishers compare with publishers such as Chappell, MPHC and Paramount-Famous, in terms of 3M's need for music?

A Can I hear the names again?

Q The names were Consolidated Dorsey Brothers, Hi-Ti, Holloway, Joy and Pic.

MR. TOPKIS: I am at a loss to understand the question so I object to its form, your Honor.

THE COURT: Would you repeat the question, Mr. Reporter.

(Question read.)

THE COURT: I think the question is somewhat ambiguous. What do you mean by how they compare in terms of 3M's need for music?

MR. BAKER: Your Honor, I think he testified earlier that Chappell was one of the most important publishers which they sought, and they offered them I believe it was 200 songs, and that MPHC was one of the most important publishers they sought, and I believe that there was some testimony that TRO was somewhere between Leeds and someone else.

THE COURT: Using that same classification system, you want to put it that way?

MR. BAKER: Yes.

A Would you like me to take them one at a time or

as a group?

Q Either way.

THE COURT: Then I advise you to take them as a group.

A Probably the entire group was equivalent to Chappell's.

THE COURT: You mean in the volume of usable songs?

THE WITNESS: Yes, sir, right.

MR. BAKER: No further questions, your Honor.

MR. TOPKIS: Just a couple on recross, if I may.

RECROSS-EXAMINATION

BY MR. TOPKIS:

Q Mr. Arrow, on the question of whether it was reported to you that Mr. Star of MPHC was considering a direct license to 3M or was considering it favorably, I would read you from your deposition at page 254, line 9, and ask you whether this refreshes your recollection or helps you in any way.

"Q Do you recall the reasons why MPHC did not enter into an agreement with 3M?

"A Yes."

Q You seem to have gone on.

"A Mr. Lee's supervisor was, as I said before, Mr. Star. It was Mr. Star's decision to make. I was advised

by Mr. Lee that Mr. Star was considering the subject favorably. Then he became ill and eventually made no decision with respect to this matter and no contract could be concluded at all."

Does that refresh your recollection, sir?

A The difference between considering a proposal favorably and not considering it negatively is, I suppose, a distinction.

I did have the impression from Mr. Lee that we would probably make an agreement with MPHC. It is difficult to recall his exact words. I did have an impression that Mr. Star would not have turned the arrangement down.

THE COURT: I take it that you felt the mere fact he was considering it was a favorable sign of sorts?

THE WITNESS: Yes, sir.

THE COURT: That may have been an element of the favorable atmosphere?

THE WITNESS: Yes. I would say that the atmosphere was favorable.

Q To your knowledge, was Mr. Star at that time a director of ASCAP?

A I believe he was.

Q Going back for just a moment to Mr. Brettler of Shapiro Bernstein, do I understand that Mr. Brettler did

some market research and reported the results to you?

A Mr. Brettler said he did, yes.

Q Did you use the market research report that he made to you in dealing with other publishers?

A No.

MR. TOPKIS: No further questions.

Thank you, Mr. Arrow.

THE COURT: Mr. Arrow, I think you have come to the end of a long, hard road.

MR. TOPKIS: Your Honor, before Mr. Arrow leaves, we have pending the question of all of these license agreements.

MR. HRUSKA: On that, your Honor--

THE COURT: Pending in what regard, their admissibility?

MR. TOPKIS: I offered them.

THE COURT: I know, but we don't need to keep Mr. Arrow for that. I already stated that I don't know of any reason why they won't be admitted, but that will be a legal question.

He has done everything to render them competent.

MR. TOPKIS: Fine.

MR. HRUSKA: I would like to ask Mr. Arrow one further question, your Honor.

REDIRECT EXAMINATION

BY MR. HRUSKA:

Q Mr. Arrow, what other than the report given to you that Mr. Star was considering the 3M proposal was your basis for believing that the atmosphere was favorable?

A Mr. Lee's approach to the problem.

Q It was Mr. Star's decision to make?

A That is correct.

Q And you based your conclusion of a favorable atmosphere on the fact that Mr. Lee was approaching the problem in a non-negative way?

A I would say Mr. Lee was positive and that was one of the encouraging factors in the situation.

MR. HRUSKA: No further questions.

THE COURT: I suggest that you leave the courthouse while you have a chance, Mr. Arrow.

THE WITNESS: Thank you.

(Witness excused.)

MR. HRUSKA: Our next witness, your Honor, will be Mr. Segelstein of CBS.

MR. TOPKIS: Your Honor, before we go to Mr. Segelstein could we offer your Honor an interim report on our conversations with Miss Preston. They have been conducted by Mr. Gitter and I would ask you to hear what he

has to say.

MR. GITTER: Your Honor, I asked Miss Preston how long it would take to get the records and the information that Mr. Topkis asked for in the letter.

She said that some of the information is not in the New York office of J. Walter Thompson. She said some of it would be in the Chicago office, the L. A. office, perhaps some others.

In order to gather all the information she said it would take about a month.

I then asked her how long it would take to gather only the information in the New York office.

She said it would take ten business days, and she said the reason for that was that they would have to go back in the files created prior to 1972, and those were in dead storage.

I then asked her how long it would take to get the information by looking only at the files that were created in 1972 and she said she thought it would take six to eight business days.

I told her that I didn't think, therefore, it would make much sense for her to come down at two o'clock, I would inform her of your Honor's wishes about the lunch hour.

THE COURT: The question whether it makes sense for her to come down depends, of course, whether that is the only subject on which you are going to question her.

You have to advise me on that. If that is the major part of her testimony, that is one thing. If it is one out of two or three other subjects, then we can finish up this one subject when the time comes.

MR. TOPKIS: No, that is it, your Honor. I don't think I have much of anything else.

THE COURT: Then I suggest immediately before we resume at two o'clock I will see counsel in the robing room, we will decide how to schedule her appearance and under what circumstances.

MR. TOPKIS: Very well, your Honor. Thank you.

MR. GITTER: Should I advise her not to come at two and await further word?

THE COURT: Yes.

All right, Mr. Hruska.

MR. HRUSKA: Mr. Segelstein.

THE COURT: Mr. Hruska, what about the Professor?

MR. HRUSKA: We had thought, of course, that Miss Preston would be on today and with other witnesses we would occupy the entire day. We did not, if possible, want to break up Professor Southworth's testimony again.

THE COURT: I agree with you.

MR. HRUSKA: We were inclined to have in mind tomorrow morning.

THE COURT: That is fine.

I R W I N S E G E L S T E I N, called as a witness by the Plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HRUSKA:

Q Mr. Segelstein, what is your present position at CBS?

A Vice president, Program Administration, CBS Television Network.

Q What are your responsibilities in that job?

A There are three areas of responsibility. First, I supervise the operations of the New York Program Department. The gentleman in charge of the New York Program Department reports to me, the vice president of New York Programs. That covers current programs produced in New York, children's programs, the daytime program schedule, special programs, mini series, the prime time movies, and if I haven't mentioned it, the CBS Late Moveie.

Q What are mini series?

A That is a limited series, like Henry the Eighth or

the shows you see on the Public Television Masterpiece Theatre.

Q Does that mean that foreign production also comes within your area?

A Yes, as a matter of fact, it does, yes.

THE COURT: Now that you think of it.

THE WITNESS: I haven't been in London in a long time.

A In addition, I am responsible for current programs onour schedule prime time East Coast and West Coast, and finally, I am involved with program development and program planning of the various schedules for the different day parts of our schedule.

Q What did you do before coming to CBS?

A Well, for 18 years I worked at an advertising agency, Benton & Bowles.

Q Could you briefly outline the jobs that you nad at Benton & Bowles and what your responsibilities were in those jobs, each such job?

A I came to Benton & Bowles in 1947, or at least I joined the radio department of Benton & Bowles in 1947, a job of tremendous responsibility, as a trainee, clerk, mimeograph operator, and then in the late '40's, '48, '49, I became a production assistant in the early days of

television, providing production elements and ordering those elements for commercials, live commercials, like Maxwell House commercials on Mama, and for those shows which Benton & Bowles produced in those days, a show like Juvenie Jury.

So I was production assistant in 1947-1949.

About 1950 I became what today would be called the associate producer or line producer of the first network television daytime serial, which was known as The First Hundred Years, and lasted one year, and I did what associate producers do.

I was in charge of production elements and the budget of the show.

Shortly after that I went back to the office instead of the studio and worked as the commercial producer for Benton & Bowles products, like Prell and Tide and Maxwell House Coffee and Instant Coffee and some of the-- and acted as the commercial producer for film commercials which were put on network or local television.

That takes us to roughly the mid-50's, when I became the director of films at Benton & Bowles and ran a department which coordinated our clients' commercials and films, getting them over to the network or networks, and also bought for and on behalf of these clients syndicated

programs, like, oh, Highway Patrol and Sea Hunt, Whirlybirds, for advertisers like Continental Oil.

In the late 50's, 1959 perhaps, 1960, I was appointed associate programming director in the radio-television program department, by then television-radio program department, and was made a vice president of the agency shortly thereafter, and my function was to-- well, I was the in-house contact for the Procter & Gamble programs, the shows that Procter & Gamble bought through Benton & Bowles or were house-produced at Benton & Bowles, and in this primarily then was Procter & Gamble's advertising agency liaison with the networks program producers, program packagers, and the like, advised them on shows to pilot -- In those days advertisers made television pilots-- and also worked for them on which network programs to buy.

Subsequent to that I became the director of programming and the vice president in charge of programming at Benton & Bowles, in which I performed the same function but did it for all the agency clients, Texaco and Johnson Wax.

And that brings us to CBS.

Q What was your first job at CBS and when was that? 1965, did you say?

A June 28, I believe, 1965, I joined CBS as vice president, Programs, New York, and was responsible for that litany of things I read earlier, the New York programs, the program development in New York, the children's programs, the prime time movies, et al.

Q Program selection and development, too?

A I am involved in program selection and development now, yes.

Q When did you assume your present position?

A In I believe it was July. Certainly the summer of 1970.

Q Mr. Segelstein, could you tell us the basic steps in the development of network programs?

A Yes, of course.

MR. TOPKIS: Can we focus on some particular time or are they all the same?

THE COURT: Let's hear what the witness says.

A The network program starts with an idea or a personality or both. Personality, of course, is much more the dominant factor in variety programming or in some comedy programming, and the idea, plus the personality, if you can find one, is dominant in the development of story form and comedy.

From the idea we ask the writer or the producer,

whoever brought the idea, to develop an outline or treatment. If satisfactory, mutually satisfactory, we go on to a script and revisions of script.

Then if it seems promising a pilot film is made. Then finally a program becomes a television series on the air.

Q As someone who participates in selecting programs for airing on the CBS TelevisionNetwork, what in your opinion are the ingredients which tend to make a program successful?

A I don't believe that any show, in my opinion, becomes a hit without a happy mix or combination of ingredients, and hopefully with those ingredients adding up to more than the sum of its parts. Except in rare situations, it is a total mix of all the creative production elements that makes a show work and, of course, a good basic idea.

Q And a show that works in the pilot stage, is it your experience that that kind of show will continue to work in its run for some sustained period of time?

A Not necessarily. The best pilot I saw just a year ago was something called Bridget Loves Bernie and it is no longer on the air because it simply never lived up, in its writing and in its characterization, to the promise of the pilot.

A good pilot helps because it teaches you what you

did right and what you did wrong, and the producer, once the selling is over, can really get down to the serious business of evaluation based on the pilot, cast changes, et cetera.

Q Is it possible for you to characterize this commodity of a television program in terms of its sturdiness or its fragility? Is that a judgment you can make?

MR. TOPKIS: Could I have that question back, please?

THE COURT: Yes.

(Question read.)

MR. TOPKIS: Could I have what commodity it is which may be either sturdy or fragile?

THE COURT: I take it you are talking about a network program?

MR. HRUSKA: Yes, your Honor.

THE COURT: And one of a series I presume, too. Obviously one program doesn't have particular endurance.

MR. HRUSKA: Yes, your Honor, of course.

A Well, I think until you get the right combination of elements we are dealing with a very fragile mix of things. I am not even sure that you can predict sturdiness without week-to-week attention. It is indeed a week-to-week job of putting shows together.

Q How important to this mix is the music element?

MR. TOPKIS: If your Honor please, do we have to spend time on this? CBS has been spending millions for music for years. I would think that establishes that it has some importance.

THE COURT: Well, obviously it has importance. I take it that is going to be demonstrated.

Let me hear what Mr. Segelstein has to say. I don't suppose it will take long.

A I think music is very important. It is quite obvious, of course, in variety programs, there is no show without the songs, without music for the dancing.

It is terribly important in story and film programs, motion pictures, to set mood or time or even for comedy you do rim shots for jokes, you have play-off music and play-on music and the music does-- the eerie music in Spellbound.

If you saw the wall-to-wall music of Lassie-- because there is no dialogue unfortunately when Lassie is on the screen, and really the suspense of a Hitchcock picture without music-- next time you go to see a movie see if you can tune out the music and see how effective it is.

I think the music is terribly important.

Q What about the objectives of program development

and selections? What in your opinion are the factors which make a network schedule successful?

A Talented schedulers. A schedule is really a very sophisticated -- setting a schedule is a very sophisticated, complicated process. It takes us a very long time.

First, we deal with a total - let's take a prime time schedule-- balance - so that there are music, variety, comedy, drama, melodrama, et cetera; then there is the attempt to get the right show in the right time period.

We try to construct nights of the week; shows are not scheduled individually; and there is a very serious attempt to try to get compatible programming following one another in terms of audience flow or audience composition with respect to our own programs, and with respect to our competition.

I think it will make it clearer if I use an illustration. On Monday night ABC schedules football.

THE COURT: Schedules what?

THE WITNESS: Football, National Football -- professional football from nine to eleven Eastern Time.

We schedule Lucy and we will this fall schedule Dick Van Dyke and Medical Center, because we feel that football has a great deal of masculine appeal and that

these shows have woman's appeal; and so we think this is effective counter-programming and a choice for the audience.

Comedies are frequently scheduled in blocks so that the people who enjoy comedy will have one comedy follow another.

We hope we can schedule so that we don't have three story forms although that does happen in a time period but that the viewer will have a choice?

As I said we try to balance the evening so that there is a flow from one show to the lead-in to the lead-out to the show that follows it, and finally we try to inject into a schedule each season some freshness or innovation or new programs so that it represents some sort of a re-seeding for the future. for next year's schedule and the year after.

Q Do you try to give those new programs the benefit of the audience of a more established program?

A Whenever we can, and if we don't do it theproducers remind us to. The Newhart Show, Bob Newhart last year was between Mary Tyler Moore on Saturday night and I believe it was then Mission Impossible - it is now Carol Burnett, as that is a hammock position, at least we consider it a hammock position.

THE COURT: What kind of position?

THE WITNESS: Hammock position, which, where a new show would have the benefit of a lead-in and a lead-out for sampling, audience sampling, and that is a very common technique.

Q You mentioned program balance in the schedule. Are there any cyclical trends in programming?

A I think there are trends in all --

Q In types of programming, --

A I think there are trends, there have been trends in the entertainment business. Right now there are two westerns on television, Gunsmoke and Kung Fu, if that is a western. And it was not too many years ago when everybody said there were 15 westerns.

We have a situation, the converse, where there is quite a bit of serious concern about the number of police action melodrama programs on the air, when there were not that many we built it to what may be a peak.

I think variety shows are probably close to the bottom. As recently as 1968 or 1969 there were 15 network variety shows in the days of Red Skelton and Gleason and Hollywood Palace and what have you, and now there are just four or five; so I think that cycles -- there is a cycle there, too. There are trends and cycles, I believe, yes.

Q Do you believe that there will be an upswing in the number of musical variety programs on the network television in general and CTN in particular?

A I think there will be. At least we are working very hard trying to develop shows for the variety form. We have two variety shows scheduled, and we would like more for balance; and we have a number of special pilots in the works, but I suppose if there had not been a Writers Guild strike this summer we wouldhave scheduled variety try-outs, summer replacement programming. We had some on the boards.

Q Are any efforts being made to find the talent that can sustain musical variety programs?

A Constantly. I think we have - the department is keeping in touch with what goes on in the world of entertainment, variety, music, what have you, and visits. A lot of money is expended in visits to clubs or concerts; so there is a -- and of course I think the agents are all over us with variety possibilities. There is quite a bit of effort directed to it.

Q I'd like to show you, Mr. Segelstein, a set of exhibits that were previously marked as PX 541 through 544 for identification.

A I have a 540 here.

Q All right.

I see youare right. 540 to 544 for identification.

Could you identify those exhibits?

THE COURT: As a group or singly?

MR. HRUSKA: I believe this could be down as a group to save time, your Honor.

MR. TOPKIS: They have already been identified and received.

MR. HRUSKA: No.

THE COURT They have been marked for identification. They haven't actually been identified.

MR. HRUSKA: They were marked for identification. They were shown to Mr. Sipes. Miss Kearse pointed out Mr. Sipes was not a member of the program department and therefore --

THE COURT: He didn't know what they were.

MR. HRUSKA: Yes.

Q Do you know what they are, Mr. Segelstein?

A These are night time program schedules and day time -- well, they are program schedules of various day parts for various years which are released by the program department or a member of the program department to a routing list.

Q How big is that list? Approximately?

A 1800 people, I believe.

THE COURT: What kind of a list did you call it?

THE WITNESS: A routing list.

THE COURT: R-o-u-t-i-n-g?

THE WITNESS: R-o-u .

A Yes, they are various day parts, and --

Q Are these put out in the ordinary course of business by CBS Programming Department?

A Yes, a member of our department whose area is program services, director of program services, makes up schedules for each of the various parts of our schedule periodically, updating them as there are changes or what have you.

MR. HRUSKA: I would offer PX 540 through 544 into evidence.

MR. TOPKIS: I will bow to Miss Kearse. If she is happy, I am.

MISS KEARSE: I have no objection.

THE COURT: All right, the atmosphere is favorable.

xx (PX 540 to 544 inclusive received in evidence.)

THE COURT: Are we going to talk about them?

MR. HRUSKA: No.

THE COURT: Then I will return my copies.

Q Now I would like to show you, Mr. Segelstein, PX 545 through PX 549 for identification.

Could you identify those?

A These are the equivalent of the schedules we saw before except these are for specials, and interruptions of regular programming.

Q Are these also routed by the program department to approximately 1800 people?

A Yes, it is the same distribution list. It goes to all the departments of the television network, the sales, and the program practices, and the financial, and the operational, et cetera, and to a certain number of outside advertisers and agencies.

MR. HRUSKA: I offer them in evidence, your Honor.

THE COURT: I take it there is no objection?

All right. Received.

(PX 545 through 549 inclusive received in evidence.)

Q Mr. Segelstein, do you know how music is licensed for performance on CTN programs?

A It is licensed on an annual fee basis from ASCAP and BMI.

Q Have you ever heard of the term "blanket license"?

A Yes; blanket license.

Q I would like you to assume that the CBS Television Network were to cancel its ASCAP and BMI blanket licenses and have no licenses from ASCAP and BMI;

Assume further that the NBC and the ABC Television Networks retained their ASCAP and BMI licenses;

Assume further that CBS' cancelation, CTN's cancelation of its ASCAP and BMI licenses has the effect of reducing to some extent, say from 10 to 20 per cent, the availability of musical compositions which program producers want to use.

What effect do you believe that that condition would have on CTN programs?

MR. TOPKIS: I object, your Honor. They hypothetical is all right but wild guessowrk -- how can anybody possibly know?

THE COURT: I don't know whether he can know. We will know he can't. Have an opinion he may and whether it is weighty will have to be seen.

MISS KEARSE: There is also no support in the record, your Honor, for the third assumption that Mr. Hruska is asking the witness to make.

THE COURT: I don't know where the 10 to 20 per cent figure comes from. He can assume some reduction.

MR. TOPKIS: That is what prompted me to call it

guesswork.

MR. HRUSKA: The question is as to whether or not there would be a reduction in the availability of music the program producers want to use in the event of a CTN bypass which is of course one of the core issues in this case, and I believe that if we were to try to argue now, your Honor, as to whether or not the entire record as it has been compiled up to now demonstrates that proposition, we would be arguing whether or not there ought to be a judgment entered in this lawsuit.

THE COURT: I think what we need to do at the present time is to-- well, I will allow the question to be answered.

I share some skepticism as to what the importance of the answer will be but let's see what Mr. Segelstein has to say.

A I wonder if I might have the question back.

THE COURT: Yes.

The question is, if CTN canceled its ASCAP license and had no ASCAP license, or BMI license whereas NBC and ABC continued on the present situation, and as a result of CTN's canceling its license, about 10 to 20 per cent of the music that you wanted to use was not available, what effect do you believe that would have on

CBS's production?

MR. KRUSKA: Programs.

THE COURT: Programs.

A I think it can only have an adverse effect. Any time a producer has to settle for something less than whatever the percentage he desires, it can only have an adverse effect on the program.

THE COURT: I don't think anybody here would quarrel with you that given the assumptions that you were given that it would have an adverse effect.

Do you think you can be any more specific than that? In what way and to what degree?

A In my opinion on several programs it could have a very serious effect.

THE COURT: Can you give us an example? At least the type of program.

A Well, if I could-- if on Wednesday evening Sonny and Cher at eight o'clock had to seriously cut back or make judgments about music that were less than the best judgment, pick songs and lose them because they were unavailable, then I think the Sonny and Cher Show, and incidentally, that is our lead-in show, so it is more than Sonny and Cher we are talking about, but our lead-in show could be seriously hurt.

I think if Ed Sullivan invited the Beatles to come on his program and it turned out that 10 to 20 per cent represented the songs that were the Beatles', that that is a serious matter and could make a very difficult situation, or Tiptoe Through The Tulips--

THE COURT: That particular example of the Beatles turned out wrong. I think it wouldn't be so tough because you could probably get the permission of the Beatles themselves, couldn't you, under those circumstances?

THE WITNESS: Perhaps so.

THE COURT: But anyway --

Q What impact would there be on performers or producers under these circumstances?

A If a performer wanted to sing a song, as his or her first choice, or a production number was devised for a dancer with a certain number and it became unavailable and I think we wouldhave a very unhappy performer, and I think if that happens often enough, performers will not come back to Sonny and Cher if they can get work in Vegas or in films or on Dean Martin, so I think it has a -- could have a domino effect of more than an individual program.

What I am really saying is that if something

like this affects the atmosphere or the climate or the happy life which we hope our artists live they are just not going to come to CBS. They will go to NBC or they will go to Vegas or they will go to some place else.

THE COURT: I take it then you don't recommend that CTN cancel its license unless NBC and ABC do it.

THE WITNESS: I think that would be a disadvantage question.

Q I guess you have implied this before but let me make it crystal clear on the record.

Would these factors that you just alluded to, have any effect on the current network schedule of programs as opposed to individual programs?

A You mean the reference to Sonny and Cher?

Q Well, the reference to Sonny and Cher and what you referred to as the climate or the environment.

A Well, I guess Sonny and Cher I think is particularly significant. If Sonny and Cher becomes hurt by unavailability of music, by inability to do the show to its maximum in that particular night, which is a practical consideration, it is not a speculative thing, Sonny and Cher is the lead-in for a new program, for a program in a new time period, and we depend on Sonny and Cher to deliver an audience to it, because the uniqueness aspect of Wednesday night is that

ABC and NBC both have 90 minute programs starting at 8:30. If Sonny and Cher does not hold the audience until nine o'clock, if it deteriorates in quality and people sample it -- people turn away, then at nine o'clock we will have no lead-in for the nine o'clock program, and indeed the ten o'clock program; so I am concerned about a whole night.

THE COURT: So if the keystone is weakened the whole arch can fall, is that right?

THE WITNESS: I think it is quite possible, yes.

Q In your experience, Mr. Segelstein, how readily can you recoup from failure in a particular time period?

MR. TOPKIS: Your Honor, really.

THE COURT: I don't think we need that, Mr. Hruska. I am prepared to believe that if you suffer severe injury of that kind, it would be meaningful. I don't know that -- it may take a few minutes only.

MR. HRUSKA: I think it will, your Honor, yes. Just really what I want to get from Mr. Segelstein is how meaningful it is in terms of --

THE COURT: Let's do it very briefly.

MR. HRUSKA: All right.

THE WITNESS: It is very difficult to recoup. Without belaboring it, Saturday night, 9:30, ABC's telecast Hollywood Palace, and for reasons best known to them they needed that show elsewhere in the schedule and moved it out and I don't think they have recovered yet.

Now just so we are impartial, we had the same situation on Friday night in the kickoff time period where Wild West was the last hit, we had there. We have been trying ever since with God knows how many shows, to try to rebuild that time period.

Q Why does this happen?

THE COURT: Because we all get used to looking at the programs we like.

A I think what happens is if a show -- it is

precisely that, your Honor. There is a habit pattern that sets up, and when some show is removed or weakens, then you start to sample the shows across the street, some of which are frequently good, and a habit pattern builds up for that one and you may have to wait for the end of the live cycle before you can make a dent. God knows Bonanza was a terrible problem for CTN Sunday night at 9:00 o'clock for many, many years.

Q I had previously asked you to make certain assumptions regarding the 10 to 20 per cent reduction, etc. I would like you to continue under those assumptions for this question:

How in your opinion would that condition affect the cost of program development?

A Well, if we assume that programs deteriorate then we must assume for the future we have to replace them. We have to have backup programs.

We work on a rate of about three and a half pilots to --

THE COURT: Three and a half what?

THE WITNESS: Three to four pilot films for each series that we intend to put on the air, so that the cost of program development is exponential with respect to the

series that you need to replace, and scripts leading to those pilots.

So that you can reach a situation -- of course there is a program mortality on the air -- fatality is very high, three to one of new series going on the air for new series making it. In effect, then your program development costs just skyrocket, and someone once described it as like digging yourself into the ground.

MR. HRUSKA: I have no further questions of this witness.

MR. TOPKIS: Just a few, if I may, Mr. Segelstein.

CROSS-EXAMINATION

BY MR. TOPKIS:

Q Do I understand from you that in setting up an evening's programing, you try to hold your audience from one program to another?

A Yes.

Q The idea is to have one program build an audience which the ensuing program will hold and perhaps build so that the third program will do fine also, is that it?

A Hopefully.

Q You testified, I think, that you were looking forward to increased use of variety programs on CTN.

A Yes, I did.

Q In point of fact, though, for next year you have one fewer variety show scheduled than this year, isn't that right?

A That's correct, than we had this past season.

Q Right.

A Yes.

Q This past season you have had three?

A Correct.

Q Next year you are scheduling two?

A Correct.

Q As a matter of fact, Mr. Segelstein, all that you have been talking about about how these programs would be hurt if they had 10 or 20 per cent less music available to them or whatever that assumption was, that applies to variety programs, doesn't it?

THE COURT: You mean only.

MR. TOPKIS: Yes.

A I think it applies particularly to variety programs, but I don't know necessarily that it applies only to variety programs.

Q Let's take a situation comedy. You name one, if you will.

A Okay.

Q All right, I tell you what. I will name one. Let's talk about Lassie, because that is one, God save me, I remember. Let us --

THE COURT: You mean to say that is a comedy?

MR. TOPKIS: No, only to those with a broad sense of humor.

It is one of the few television shows I am intimately familiar with.

Q Do I understand you to say that if for some reason or other you couldn't reach a deal with whoever it was who wrote the immortal music that serves as background theme for Lassie, you would have a terrible problem in finding someone of approximately equal talent to write music for the show?

A Well, nothaving selected that personally, I really don't know. Perhaps he was the best dog music writer in the business. I don't really think it might be quite so critical there as it might be with Carol Burnett or Dean Martin, if that is what you are trying to get me t say.

Q So really the only point where it could even be perceivably critical would be in connection with variety shows, isn't that right?

A I don't know what you mean by "perceivably

critical".

Q Well, we are engaging in guesswork and I am asking you for your best guess.

A I think there are dramatic series where an inability,or specials -- an inability to get the -- where the producer finds it unable to get what he desires may be a problem. I don't know.

Q But you really have no idea?

A No, I couldn't quantify it for you, no.

Q And you can't think of any situation where, in your experience, a particular program was prejudiced because one composer turned out to be unavailable for that program and the producer had to hire another one?

THE COURT: Has it happened?

MR. TOPKIS: What?

THE COURT: Are you asking him if he can think of a program for the future?

MR. TOPKIS: No, where it has happened.

A I don't recall one.

Q I didn't think so.

THE COURT: But I am correct in understanding they have been able to get all the music they wanted up to now, isn't that correct?

MR. TOPKIS: They haven't been able to get all

the composers they wanted. My question was about composers, you noticed, your Honor. I wasn't asking him about music because --

THE COURT: No, I know. You mean some people whose music would not be available through ASCAP or BMI?

MR. TOPKIS: No, most of the music that is on the air today is specially composed for the particular program.

THE COURT: You are talking about that. All right.

MR. TOPKIS: That is right, all the music for situation comedies, for dramatic series, for films and so on, they are talking all the time about these two miserable variety shows. That is not what is on television, your Honor.

MR. HRUSKA: Your Honor, we are now in an area I believe of oral argument. I know that a couple of things Mr. Topkis said I would disagree with, certainly his quantities.

THE COURT: I will give you time for argument but what I am trying to clarify at the moment is the kind of music that Mr. Topkis was questioning Mr. Segelstein about. You understood, did you not, that he was talking about newly composed music, not music that you had available

from the licensing organizations?

THE WITNESS: Yes, I understood him to be talking about the unavailability of the composer.

Q Let me ask the question perhaps in this quantifiable fashion, Mr. Segelstein. Would you say that the composer of the background music for Lassie was more or less replaceable than the lead performer?

A There were 18 Lassies.

MR. TOPKIS: In my recollection it was the dog. Some people may have had eyes for June Lockhart, but --

THE WITNESS: There were 18 Lassies, so I don't know whether he was more or less replaceable than the composer and I think perhaps -- I really am not familiar with Lassie. It was just about going off the schedule as I joined CBS and I really don't hold myself up as an expert.

Q All right, sir.

A On that show.

Q I understood you to say that you would expect that to some degree which you couldn't quantify, the loss of availability of music would be prejudicial to a producer and to a program, right?

A Yes, I think I saidthat more than somewhat.

Q I take it that the conclusion that would flow from that would be that the ideal situation or the best

possible situation would be that wh[illegible]n the producer had available to him all the music that he wanted to use and all he had to do was choose it, is that right?

A It is ideal from the point of to get an abstract sense, yes, in some respects, I suppose there are more ideal situations.

Q That would be the best way of maximizing production values, performance values, isn't that right?

A No, I don't believe that I agree with that.

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Q You want some limitation?

A There are things better than that, and that would be, I think, the producer having the ability to control the use of music within his own budget.

In other words, in addition to having the total availability, which I think is quite desirable, yes, absolutely, I think if within his own control he was able to use music as a flexible element within his budget, he could then balance all the production elements inthe most favorable way for any individual episode or any individual program.

Q Have you by any chance read any of the depositions in this case in preparation for your testimony?

A No, I am afraid I haven't.

Q Any of the trial testimony?

A No, sir.

MR. TOPKIS: No further questions. Thank you, Mr.Segelstein.

THE COURT: Any questions, Miss Kearse?

MISS KEARSE: May I have just a moment, your Honor?

THE COURT: Surely.

(Pause.)

CROSS-EXAMINATION

BY MISS KEARSE:

Q Mr. Segelstein, can you tell us what percentage of CTN programs -- and by "programs" I mean individual episodes -- can you tell us what percentage of CTN programs use music that is not specially created for the program?

A No, I can't. I am sorry. I don't know.

Q Do you have any idea at all?

A No.

MISS KEARSE: I have no further questions.

MR. HRUSKA: No redirect, your Honor.

We can excuse Mr. Segelstein.

BY THE COURT:

Q In answering Mr. Topkis about the importance of having available all types of music or as much music as you wanted to, you added that it would be even a better situation if the producer could control his budget on music cost, am I correct?

A Yes.

Q What was it that prompted you to make that suggestion and where have you become acquainted with that concept? You were asked by Mr. Topkis if you read the depositions or if you read testimony. You haven't. Where did you get the idea?

jhb-3 Segelstein-

A I had some conversations about what was at stake with Don Sipes and with Mr. Hruska.

Q So you felt that that was implied in the situation here in your expressing your opinion about it, is that right?

A Yes.

Q How much thought haveyou given to that question?

A Well, since it first came up, quite a bit, I think.

Q What do you mean by that?

A Oh, perhaps a month ago or so. For example, I have talked with -- on at least one occasions, with a variety producer about his opinion. As a matter of fact, with two of them, now that I think of it. And so although it is not a voluminous sample, I did get a feeling.

Q But their reactions have helped to shape your view in the matter, is that it?

A Yes.

THE COURT: All right.

MR. TOPKIS: Could I just ask a question.

RECROSS-EXAMINATION

BY MR. TOPKIS:

Q These one or two variety producers you spoke with, was one of them Mr. Vincent?

A Yes, it was.

Q Was another Mr. Wright?

A Yes.

Q By any chance, were there three and was the thir d Mr. Sunga?

A No.

Q How did you miss him?

MR. TOPKIS: No further questions, your Honor.

THE COURT: All right. Thank you very much, Mr. Segelstein.

(Witness excused.)

MR. HRUSKA: Your Honor, I should say right now we do not have another witness waiting at this moment. We will have a witness here at two o'clock.

THE COURT: All right.

MR. HRUSKA: Assuming your Honor wishes to commence at two o'clock.

THE COURT: Yes, I do.

MR. HRUSKA: With Miss Preston pulled out of the schedule, as I indicated earlier, we had been planning to call Professor Southworth tomorrow morning, I believe we could have him here this afternoon to follow the first witness in the afternoon.

THE COURT: That would be fine with me. Is he coming up from Virginia?

MR. HRUSKA: No, he is now here.

THE COURT: All right. I would like to get his testimony.

MR. TOPKIS: Who are we going to have then this afternoon?

THE COURT: Professor Southworth after the first witness.

MR. HRUSKA: We will be calling Mr. Poklitar, as I had previously advised counsel for defendants.

THE COURT: I heard his name enough so that I assumed that he would be coming sooner or later.

All right. We are adjourned until two o'clock.

(Luncheon recess.)
